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## PARKING FACILITIES AS PUBLIC UTILITIES

David R. Levin\*

THERE ARE CITIES in the United States where neither private enterprise nor public authority is making a significant effort toward the provision of off-street parking facilities because of a sharp difference of opinion as to which one should do the job. This conflict between the public enterprisers and the private enterprisers has stymied action, to the detriment of the public interest in a field of the most critical importance. This study of the possible application of the public utility concept to off-street parking facilities has been undertaken in an attempt to resolve this dilemma.<sup>1</sup>

The successful arbitrator must first determine the principal objectives of each disputant. Proponents of municipal action seek reasonable user rates, high standards of service, responsible management, and permanent locations and capacity appropriately related to the generators of parking demand. Advocates of the private provision of parking facilities seek profits and freedom

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<sup>1</sup> Public utilities may be municipally owned and operated. This monograph is concerned only with public utilities that are owned and operated by private persons or corporations. Statutes exist authorizing municipalities to acquire land for use as off-street parking lots. See, for example, Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 52.1—1 et seq. The latter was held constitutional in *Poole v. City of Kankakee*, 406 Ill. 521, 94 N. E. (2d) 416 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 188.

from municipal competition. The public utility approach may contain the essential elements of a compromise that would be acceptable to both disputants, embodying the major objectives of each.

The plan of this monograph, then, calls first for the isolation of the legal elements of a public utility, insofar as they are discernible from the statutes and the court decisions, and, in that regard, to delineate the nature of an enterprise "affected with a public interest." Second, such matters as certificates of public convenience and necessity, monopolistic characteristics, the elements of public use, and rate regulation will be explored. Third, existing public regulation of commercial parking facilities will be indicated. Lastly, an appraisal will then be made concerning the qualification of off-street parking facilities as public utilities.

### I. LEGAL ELEMENTS OF A PUBLIC UTILITY

Before a student of the problem can speculate as to whether off-street parking facilities would legally qualify as a public utility, he must be informed as to the characteristics which the judiciary has, from time to time, attached to the public utility concept. Sometimes, the courts have been evasive, perhaps purposefully. Moreover, it is difficult to fashion a definition of a public utility which would fit every conceivable case. So far as it is possible to deduce them, the legal elements of a public utility would appear to be about as follows: (1) The enterprise must be "affected with a public interest." Property becomes clothed with a public interest when used in a manner to make it of public consequence and when it affects the community at large.<sup>2</sup> (2) The enterprise must involve a "public use." The public utility concept is involved if private property is devoted to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or service shall be conducted with reasonable efficiency and for proper charges.<sup>3</sup>

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1876).

<sup>3</sup> *Garkane Power Co. v. Public Serv. Commission*, 98 Utah 466, 100 P. (2d) 571, 132 A. L. R. 1490 (1940). See also 132 A. L. R. 1498, 93 A. L. R. 248, 18 A. L. R. 764, and L. R. A. 1918C 855.

(3) The enterprise must involve "monopolistic characteristics." To qualify from this point of view, the activity must enjoy in a large measure an independence and freedom from business competition facilitated either by its acquirement of a monopolistic status or by the grant of a franchise or certificate from the state placing it in this position.<sup>4</sup> (4) Finally, the enterprise must bear an intimate connection with the processes of "transportation or distribution."<sup>5</sup>

The foregoing are the elements of a public utility which the present Chief Justice of the United States Supreme Court set forth, in *Davies Warehouse Company v. Brown*,<sup>6</sup> while acting as Chief Judge of the Emergency Court of Appeals. Chief Justice Vinson further indicated that the formula is

designed only to provide an absolute test or standard by which one may *affirmatively* determine that a particular business *is* a public utility. I do not wish to be misunderstood as indicating that a business possessed of or operating under less than the total of these features may not be considered a public utility . . . *any* business which does possess and practice and operate under each and all of these features, is by a preponderance of considered judicial opinion a business in the public utility class.<sup>7</sup>

In short then, these are the most important elements that go to make up this legal creature known as a public utility. They may be summarized in the form of four key phrases: (a) affected with a public interest; (b) involve a public use; (c) have monopolistic characteristics; and (d) be related to transportation and distribution. The array would not be complete, perhaps, without some reference to certificates of convenience and necessity, a device frequently used to regulate public utilities. Whether a given enterprise may be deemed to be a public utility, however, is a mixed question of law, economics, and sociology.

<sup>4</sup> *Davies Warehouse Co. v. Brown*, 137 F. (2d) 201 (1943).

<sup>5</sup> *Ibid.*

<sup>6</sup> 137 F. (2d) 201 (1943).

<sup>7</sup> 137 F. (2d) 201 at 217.

Before it is possible to test the off-street parking enterprise in terms of these essential legal elements, it is necessary to know something more about each of them in order that a judgment of qualification or disqualification may be as precise as possible. In that regard, it might be wise to indicate some of the types of enterprises that have been held to be public utilities, for purpose of comparison. Among such are (1) transportation facilities, of the type of toll roads, canals, railroads, steamship lines, ferries, pipelines, express companies, and motor carriers of freight and passengers; (2) accommodations ancillary to transportation, such as terminal facilities, including wharves and docks, bridges, sleeping-cars, and baggage transfer equipment; (3) marketing facilities, such as commodity exchanges, grain elevators, warehouses, stockyards, and market ticker services; (4) systems of communication, including telegraph, telephone, radio communication and broadcasting; (5) local utilities, such as water supply, irrigation, gas, electric power, heating, sewerage, street railways, taxicabs, and others; (6) special facilities, traditionally regulated, such as innkeepers, grist mills, sawmills, hawkers and peddlers, pawnbrokers, and bakers; and (7), recently regulated enterprises, such as slaughterhouses, cotton gins, insurance companies and their agents, housing, banking, milk marketing, the processing of farm products and butter substitutes, and coal mining.<sup>8</sup> These businesses should be kept generally in mind as the analysis proceeds.

#### A. AFFECTED WITH A PUBLIC INTEREST

One of the essential characteristics of a public utility, in years past, has been that the enterprise involved must be "affected with a public interest." It was said, quite early in the public utility regulation era, through the decision in *Munn v. Illinois*,<sup>9</sup> that when

one devotes his property to a use in which the public has an

<sup>8</sup> Adapted from Barnes, *The Economics of Public Utility Regulation*, 1942, p. 20. Perhaps as diversified as the foregoing enumeration is the list of enterprises construed by the courts as not amounting to public utilities, to-wit: foundries, coal yards, mills, restaurants, apartment houses, parcel checking facilities, theater-ticket brokers, renting of automobiles, meat packing, ice manufacturing, and the sale of gasoline.

<sup>9</sup> 94 U. S. 113, 24 L. Ed. 77 (1876).

interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created.<sup>10</sup>

Changing economic and social conditions may make a business hitherto of little public concern of such importance to the welfare of the community that regulation becomes inevitable. The absence of regulation may force the direct performance of an increasing number of economic functions by the state or by its political agencies.

The courts, of course, are the final arbiters as to whether or not a particular enterprise is affected with a public interest. Many years ago, Chief Justice Taft declared that

the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.<sup>11</sup>

In light of the judicial principles already enunciated by the courts, it should not be difficult to qualify off-street parking facilities as being "affected with a public interest." The ownership and use of the motor vehicle is widespread in the United States, with approximately forty-eight million motor vehicles generating over four hundred and fifty billion vehicle-miles of travel annually. Approximately half of the motor vehicle travel takes place in urban areas. Thousands of urban motorists daily seek to penetrate the central business districts of each of the cities, and to park therein. Yet the available parking space, both curb and off-street, is far short of the actual demand, let alone the potential demand. How critical this problem is becoming in many municipalities is revealed by the data in the annexed table.

<sup>10</sup> 94 U. S. 113 at 126, 24 L. Ed. 77 at 84.

<sup>11</sup> *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280 (1923). See also *Public Cleaners v. Florida Dry Cleaning and Laundry Board*, 32 F. Supp. 31 (1940).

## Supply and Demand for Parking Space in the Core of Central Business Districts of Designated Cities.<sup>12</sup>

Population Group	Number of Cities	Space-hours Demand	Supply	Ratio of Demand to Supply
Under 25,000 . . . . .	5	3,465	2,552	1.34
25,000 - 49,999 . . . .	3	4,230	3,043	1.38
50,000 - 99,999 . . . .	2	4,290	2,964	1.45
100,000 - 249,999 . .	7	17,188	11,285	1.64
250,000 - 499,999 . .	3	20,828	6,505	3.27
500,000 and over . .	2	28,590	6,649	4.67

In the largest cities, five motorists contend for each parking space available; four of them must seek accommodations elsewhere.

In certain cases, especially where rate regulation was involved, the United States Supreme Court appears to have abandoned the concept of "affected with a public interest" in favor of a broader principle.<sup>13</sup> The guaranty of due process, the court now asserts, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. A number of state courts have followed this same line of reasoning.<sup>14</sup> It should be noted, however, that only rate regulation was involved in these cases, and that the other concomitants of public utility control, such as certificates of convenience and necessity, were not involved. It seems wise, therefore, to assume, in the case of off-street parking facilities, that the doctrine of "affected with a public interest" will continue to apply.

<sup>12</sup> Reprinted from Hitchcock and Burrage, "Some Travel and Parking Habits Observed from Parking Studies," Public Roads, June 1950.

<sup>13</sup> *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934); *Olsen v. Nebraska*, 313 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500 (1941).

<sup>14</sup> *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P. (2d) 650 (1941); *Smith Bros. Cleaners & Dyers, Inc. v. People*, 108 Colo. 449, 119 P. (2d) 623 (1941); *Kelly-Sullivan v. Moss*, 180 Misc. 3, 39 N. Y. S. (2d) 797 (1943).

## B. PARKING AS A PUBLIC USE

A legal characteristic of a public utility, closely related to the concept of being "affected with a public interest," is the doctrine of devotion to a public use, already referred to. Many years ago, the United States Supreme Court ruled that taxicabs could be regulated as a public utility<sup>15</sup> on the theory that the taxicab company was "an agency for public use for the conveyance of persons," notwithstanding the fact that a single cab conveys only one group of passengers in one vehicle. The particular cab company involved had also contracted with several hotels to furnish taxicab service to hotel guests at specified times. Despite these facts, the Supreme Court stated that it did not

perceive that this limitation removes the public character of the service . . . No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab . . . The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The public does not mean everybody all the time.<sup>16</sup>

The close parallel between parking facilities and taxicabs seems obvious. A commercial off-street parking facility is open to any motorist who desires to park in its particular location and pay the fee asked, as long as there is space available. Parking facilities today probably serve a larger segment of the public than did taxicabs thirty-five years ago when they were deemed to be public utilities.

The enterprise which provided the greatest impetus, perhaps, to the expansion of the public utility concept was the grain elevator business. For years, the grain producing regions of the West and Northwest had sent their grain by water and rail to

<sup>15</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916).

<sup>16</sup> 241 U. S. 252 at 255, 36 S. Ct. 583, 60 L. Ed. 984 at 986.



Chicago for reshipment to the East. The need for intermediate terminals at Chicago created a demand for grain elevators where immense quantities of grain could be stored and reshipped by rail or water. Nine firms, owned by some thirty persons, controlled all of the elevator and warehouse facilities in that city and set uniform fees which the shippers labeled as exorbitant but which they were compelled to pay because no other facilities were available. Pursuant to constitutional revision occurring in Illinois in 1870, legislation was enacted designating grain elevators as public utilities, calling for the licensing of such facilities, and providing for the regulation of rates. In a leading case, the United States Supreme Court upheld the regulation on the grounds that the grain elevators in question were "affected with a public interest" and had been "devoted to a public use." The court was very much aware of the strategic position of the elevators with reference to grain movements, saying "they stand . . . in the very gateway of commerce," and take a toll from all who pass.<sup>17</sup>

Here again, a striking comparison can be made between grain elevators and off-street parking facilities. Just as grain is shipped to Chicago from many different parts of the West and Northwest, so motor vehicles from many different parts of a metropolitan area are driven into the heart of the city each day. These vehicles must be parked somewhere for short periods of time, like grain upon its arrival in Chicago. Just as grain must be stored while awaiting reshipment, the motor vehicle must be parked while its driver works or shops or performs some other errand. Just as Ira Munn and George Scott, in the 1860's, "embarked their capital and devoted their industry" to supplying storage space for grain, private individuals today supply commercial parking facilities for motor vehicles. Just as the owners and operators of elevators charged unreasonably high rates for grain storage, so may the owners of private parking accommodations be in a position to

<sup>17</sup> *Munn v. Illinois*, 94 U. S. 113 at 126, 24 L. Ed. 77 at 84 (1876).

charge high rates for automobile storage, because of the great disparity between the supply of and the demand for such facilities.

Aside from these analogies to enterprises already judicially construed to be public utilities, off-street parking facilities have already been held to involve a public use by a number of high courts in the United States. In the recent case of *McSorley v. Fitzgerald*,<sup>18</sup> the Pennsylvania Supreme Court upheld a legislative declaration that the provision of off-street parking facilities involved a public use. The language used by the court is typical of the attitude of other jurisdictions on the matter. It said:

Not only is the declaration of legislative findings in the present Act impressive in pointing out the urgent need of legislation of this type, but the conditions it portrays are well known to all inhabitants of our larger cities . . . The congestion caused by such misuse of the streets (for storage instead of travel) and by the ever-increasing amount of motor vehicle traffic has become a major problem of municipal administration, . . . a problem particularly acute in a city like Pittsburgh where it is aggravated by the concentration of the downtown business section in a "Golden Triangle" of comparatively narrow streets and tall office and commercial buildings, many of the occupants of which use private automobiles to and from their offices and stores. Studies made by the Pittsburgh Regional Planning Association and the Allegheny Conference on Community Development reveal that parking facilities in that city are grossly inadequate and that private enterprise has not been able to solve the problem because private parking lots are frequently temporary in nature and located without much regard for actual parking requirements, vacant land being utilized for parking purposes in more or less haphazard fashion merely for the purpose of earning taxes on the land pending profitable disposition of it for construction purposes . . .<sup>19</sup>

<sup>18</sup> 359 Pa. 264, 59 A. (2d) 142 (1948).

<sup>19</sup> 359 Pa. 264 at 269, 59 A. (2d) 142 at 145.

Similar doctrines have been enunciated in California,<sup>20</sup> Kentucky,<sup>21</sup> Michigan,<sup>22</sup> New York,<sup>23</sup> Ohio<sup>24</sup> and other states.

### C. MONOPOLISTIC CHARACTERISTICS

The monopolistic characteristics of public utilities generally have already been indicated in preceding paragraphs herein. Off-street parking accommodations, of a type urgently needed in cities today, may also be monopolistic from several different points of view, though the monopolistic character of such facilities certainly is not as evident as are some of the other attributes of a public utility. In a consideration of this particular aspect of the public utility concept, it seems necessary to consider monopolistic tendencies, first as they may apply to parking facilities now existing in downtown urban areas, and second as they may apply to parking facilities that are largely lacking today in such areas.

In a sense, present commercial off-street parking accommodations offer the motorist-parker somewhat of a choice in his selection of a particular facility, and competition does exist in some locations and under some circumstances. It should be noted, however, that such a choice, more often than not, is limited by the ultimate destination of the parker and by his reluctance to walk any great distance. The preferential location of many existing commercial facilities, therefore, contains at least to some extent the element of monopoly.

Parking surveys conducted in a large number of cities reveal that, to be effective, off-street parking facilities must be established within a prescribed walking distance from the parking generators, especially in the central core area. While the indicated locations of needed parking facilities may not be absolutely rigid,

<sup>20</sup> *Whittier v. Dixon*, 24 Cal. (2d) 664, 151 P. (2d) 5, 153 A. L. R. 956 (1944).

<sup>21</sup> *Miller v. Georgetown*, 301 Ky. 241, 191 S. W. (2d) 403 (1945).

<sup>22</sup> *Wayne Village President v. Wayne Village Clerk*, sub. nom. *Parr v. Ladd*, 323 Mich. 592, 36 N. W. (2d) 157, 8 A. L. R. (2d) 357 (1949); *Cleveland v. Detroit*, 324 Mich. 527, 37 N. W. (2d) 625 (1949).

<sup>23</sup> *Pansmith v. Island Park*, — Misc. —, 72 N. Y. S. (2d) 575 (1947), appeal dis. 73 N. Y. S. (2d) 636 (1947).

<sup>24</sup> *Blakemore v. Cincinnati Metropolitan Housing Authority*, 74 Ohio App. 5, 57 N. E. (2d) 397 (1943).

it may be said that the desirable locations are relatively fixed in character. Parking facilities cannot be established just anywhere, witness the fact that many parking facilities are never filled to capacity because of the inappropriateness of their location in relation to the parking demand.

Monopolistic tendencies may also be evident in any concerted effort on the part of commercial operators of parking facilities to fix the schedule of rates charged. The same result may obtain in cities where a substantial number of parking facilities are owned or operated by a single entrepreneur.

Aside from location and rates, off-street parking facilities may tend to be monopolistic because of the relatively large amount of capital required to establish accommodations of modern design. Involved also is the concentration of its investment in fixed plant and equipment. In fact, a trend toward the use of the parking authority and the issuance of revenue bonds for parking facilities has become evident during the last decade. That result, in part at least, is attributable to some of the characteristics of a monopoly, namely, the limitations on ability to obtain desirable locations and to finance their development.

Although the qualification of parking facilities as public utilities solely from the standpoint of their monopolistic characteristics may be far from conclusive, it should be observed that this attribute may not be an indispensable element in the chain of qualification. In any event, it seems desirable in the public interest to restrict the number of off-street parking facilities in any particular location to those indicated by present or potential demand, consistent with an over-all traffic plan of the city and with traffic facilities that can accommodate the entry and discharge of vehicles.

#### D. ASSOCIATION WITH TRANSPORTATION OR DISTRIBUTION

An examination of the types of enterprises which, in years past, have been construed to be public utilities indicates that by far the bulk of them have been related to transportation or distribution. In fact, transportation companies and warehouses were

the first to be recognized as public utilities. Terminal facilities generally, including wharves and docks, have since been added to the category.

The intimate relationship between highway transportation and terminal facilities for motor vehicles is obvious. In fact, highway transportation involves not only the movement of vehicles, but the larger function of getting from one place to another. So conceived, complete highway transportation accommodations must include an over-all service from point of origin to point of destination, in order to facilitate a full realization of the speed, economy, and convenience of an efficient highway plant.

A recent decision involving Kansas City, in the case of *Bowman v. Kansas City*,<sup>25</sup> upholds this doctrine. Judge Dalton, speaking for a unanimous Missouri Supreme Court, there asserted:

The use of the streets for parking purposes has materially interfered with their use for the movement of traffic and the discharge of passengers and property from such vehicles. Traffic congestion has become an acute problem in many of the cities and towns in this state. The problem of parking or the temporary disposition of these vehicles during business hours when such vehicles are not in active operation is directly connected with the problem of transportation. The parking of such vehicles cannot be separated from their use in transportation and their operation upon streets and highways.<sup>26</sup>

It should not be difficult, therefore, to associate the operation of a parking lot with other forms of transportation or distribution which have become recognized forms of public utilities.

#### E. CERTIFICATES OF CONVENIENCE AND NECESSITY

In recent years, courts have tended to leave it to the legislature to declare an enterprise to be a public utility before passing upon the issue as a question for judicial determination. The result of this policy has been to make the determination of the public

<sup>25</sup> — Mo. —, 233 S. W. (2d) 26 (1950).

<sup>26</sup> — Mo. — at —, 233 S. W. (2d) 26 at 34.

utility status of an activity a matter for the joint legislative and judicial process. In that connection, most state laws make some provision for the use of the certificate of convenience and necessity as an instrument of public utility regulation. Such a certificate amounts to a revocable permit to serve the public by operating as a public utility but the recipient acquires no property rights thereunder.

Through this vehicle, legislatures have granted monopolistic privileges, on the basis of public needs, only to persons who are in a position to adequately serve these needs. The requirement of the certificate may also enable the public regulatory agency to prevent the needless multiplication of companies serving the same territory and, by avoiding a wasteful duplication of capital facilities, keep the investment at the lowest figure consonant with satisfactory service. By protecting the utility from unnecessary competition, risks inherent in utility investments are reduced and the cost of capital is thereby kept relatively low. Incidentally, public convenience refers to the accommodation which the entire community will derive from the operation of the utility. In general, the requisite showing with respect to convenience has been made when the regulatory body is convinced that there is a reasonable public demand for the service and that the utility will accommodate the public.

A requirement for a certificate of convenience and necessity has long been upheld as a constitutional regulatory device where the enterprise to which it is incident is affected with a public interest.<sup>27</sup> The applicant for such a certificate is customarily required to file with the appropriate commission or board full data with respect to the service to be rendered, the facilities to be used, the rates and charges to be made, the financial status of the applicant, and related matters. The commission or board then holds public hearings on the application, thus providing an opportunity for all who may be affected by the application to appear and be heard.

<sup>27</sup> *In re Stanley*, 133 Me. 91, 174 A. 93 (1934); *Willis v. Buck*, 281 Mont. 472, 263 P. 982 (1928); *Barbour v. Walker*, 126 Okla. 227, 259 P. 552 (1927).

## F. RATE REGULATION

It is now well established that a public utility, in return for the service it furnishes, is entitled to a reasonable compensation, in accordance with the service provided. This matter of rate determination offers perhaps the greatest challenge in the application of the public utility concept to off-street parking facilities.

Rates for public utility service may be classified as (a) contract or administrative rates voluntarily fixed or agreed upon between the public utility and the consumer, or as (b) legislative rates fixed by the legislature or the public utilities commission as a governmental function without the consent of the parties.<sup>28</sup> A state may, under its police power, but within constitutional limitations, regulate and prescribe reasonable rates which may be made by public utilities for their services to the public. This function of rate-making has been construed by the courts to be legislative in character, whether the power is exercised by the legislature itself or by a subordinate administrative or municipal body to whom the authority has been delegated.<sup>29</sup> The judiciary may, however, in appropriate instances, restrain the imposition of grossly excessive or confiscatory rates.

Once a municipality, under an appropriate delegation of power, has fixed the rates for a public utility, some courts hold that it must protect the utility against unfair competition by reason of such regulation.<sup>30</sup> When a governmental body has the authority to regulate rates for public utility services to consumers, that authority includes the power to fix any maximum rate which is fair and just to the consumer if it will also result in a fair return to the public utility.<sup>31</sup> In the absence of a legislative prescription of rates, the legal obligation of a public utility to serve all

<sup>28</sup> *Lenawee County Gas & E. Co. v. Adrian*, 209 Mich. 52, 176 N. W. 590, 10 A. L. R. 1328 (1920).

<sup>29</sup> *Houston v. Southwestern Bell Telephone Co.*, 259 U. S. 318, 42 S. Ct. 486, 66 L. Ed. 961 (1921); *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 24 S. Ct. 82, 48 L. Ed. 217 (1903), and many other cases.

<sup>30</sup> *Mapleton v. Iowa Pub. Serv. Co.*, 209 Iowa 400, 223 N. W. 476, 68 A. L. R. 993 (1929).

<sup>31</sup> *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 58 S. Ct. 883, 82 L. Ed. 1304 (1937), and many other cases.

members of the public to whom its public use and scope of operation extend carries with it the duty to render such services at reasonable rates. This obligation is implied from the acceptance of the franchise and privilege to serve the public. Yet a public utility is entitled to a just compensation, *i.e.*, a fair return upon the reasonable valuation of the property.

A long line of decisions has established the principle that rates fixed by public authority which are not sufficient to yield a fair or reasonable return on the value of the property are unjust, unreasonable, and confiscatory; and that their enforcement deprives the public utility enterprise of its property in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.<sup>32</sup> The question then becomes one concerning the factors to be considered in fixing or regulating rates. At least three fundamental bases of valuation of public utility property for rate-making purposes were advanced in the earlier days of public utility regulation. They were (1) the original cost or prudent investment base, (2) the present value base, and (3) the cost to reproduce base. Public utility property valuation today is not resolved by formula, as such, but may depend upon many variables characteristic of particular circumstances.<sup>33</sup> A determination of public utility rates must be based upon a resolution of the right of the public to be served at a reasonable charge and the right of the utility to a fair return on the value of its property.

It would seem, from a number of public utility cases, that commission-fixed rates do not violate the due process clause of the constitution if they are calculated to produce earnings high enough to support the utility's financial structure even though they are not high enough to provide a fair return upon the reproduction cost of the utility's property. It seems to be legally acceptable if the commission bases its rate level findings upon the prudent investment valuation of the utility property.<sup>34</sup>

<sup>32</sup> *Denver Union Stock Yard Co. v. United States*, 304 U. S. 470, 58 S. Ct. 990, 82 L. Ed. 1469 (1937); *West v. Chesapeake & P. Telephone Co.*, 295 U. S. 662, 55 S. Ct. 894, 79 L. Ed. 1640 (1934), and many other cases.

<sup>33</sup> See annotation on the point in 20 A. L. R. 556.

<sup>34</sup> Lewis, "Recent Developments in Public Utility Regulation," *American Economic Review*, Papers and Proceedings, 58th Annual Meeting, p. 384 (1946).



Over the years, some courts have revealed the elements which they take into consideration in a determination of the reasonableness of public utility rates. For example, it has been indicated that the very lowest rate of return a public utility should receive must be one that will induce investment when the enterprise is prudently operated.<sup>35</sup> Other courts have held that a reasonable rate of return is one that approximates the profits received upon capital invested in other enterprises where the risk involved and other conditions are similar.<sup>36</sup> A fair return to which a public utility is entitled must be determined by present-day conditions, rather than by what has happened in the past.<sup>37</sup> High rates, of course, in themselves may not guarantee a fair return. A lower rate may have a tendency to increase the use of a public utility service, and thus result in a greater net return. These are only a few of the many principles which have been enunciated by the courts in public utility rate cases.

One might well inquire at this point: "What has all this to do with parking facilities?" The answer lies in the fact that one of the apparent needs of the present time, not to mention the future, is an adequate amount of off-street parking facilities that would prove to be attractive on the basis of their user-costs. If the public utility concept is to be helpful in attaining this objective, as proposed herein, it must make possible rates which are more reasonable than those which now exist with respect to most commercial off-street parking accommodations. Yet, one of the important legal bases of the public utility concept requires that, while rates must be reasonable, rates must result in a fair return on the public utility properties.

Unless there is a bona fide trial on the merits, it would be difficult to know whether or not a dilemma is here involved. Perhaps this is the weakest link in the chain of qualifying parking

<sup>35</sup> *Petersburg Gas Co. v. Petersburg*, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542 (1922). See also L. R. A. 1915A 30.

<sup>36</sup> *Bluefield Waterworks & Improvement Co. v. Public Serv. Commission*, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1922).

<sup>37</sup> *United R. & Electric Co. v. West*, 280 U. S. 234, 50 S. Ct. 123, 74 L. Ed. 390 (1929).

facilities as public utilities. It may be, however, that the present rate structure of commercial parking facilities is too much a function of inappropriate usage by motorist-parkers, of parking facilities outmoded in design, of locations that are not close enough to parking generators, and of other factors that probably would not exist if parking facilities were regulated as a quasi-public enterprise. If this is not true, then it would seem that the public utility concept may not be helpful and that the last vestiges of private ownership of parking facilities must crumble, to give way to the public establishment of such accommodations as still another form of publicly-operated convenience for the citizenry.

## II. COMMERCIAL PARKING UNDER PUBLIC REGULATION

Private enterprise, addressing itself to the provision of off-street parking facilities, has supplied at least some of the accommodations so urgently needed in urban areas today. Such effort to supply a needed service, though sincere in its conception, has not been free of abuses in its execution. Motor vehicles stored in parking facilities have often been damaged by the negligent conduct of some operators of such parking lots. Legal redress for such acts is usually expensive to obtain and often ineffective. Personal property has frequently been stolen from parked vehicles because of a lack of adequate protection against trespassers. The free circulation of pedestrian and motor traffic is often obstructed by the unlawful practices of some operators of parking facilities. Price-gouging has not been an uncommon occurrence.

Because of these and other abuses, as well as the widespread lack of minimum standards of performance by operators of off-street parking facilities, at least forty-three cities in the United States have been caused to enact appropriate local ordinances authorizing the licensing of off-street parking facilities operated for profit and prescribing minimum standards of design, maintenance and operation. In nineteen additional cities, a business license is required, but design and operation are left unregulated,

except as controlled by building codes.<sup>38</sup> The regulatory and enforcement functions authorized in these ordinances are lodged in a great variety of municipal agencies, often with divided responsibility. In San Francisco, for example, various aspects of the regulation have been placed in the hands of the Chief of Police, the Fire Department, the Director of Public Health, and the Department of Public Works.

Generally, these regulatory ordinances do not apply to parking facilities with a very small capacity, such as those providing less than eight, nine or ten vehicle spaces, depending upon the city involved. The removal and use of parked vehicles without the knowledge or consent of their owners is prohibited in a few cities. The possible range of license fees may be from \$1.00 per facility, as in Cleveland, to \$100.00 for a facility having a capacity of more than one hundred vehicles, as in New York City. Many cities require that all licensees post prominently the rates charged, the closing hours of the facility, and other important data. Claim-check practices are prescribed. A few ordinances attempt to protect the motorist-parker against disclaimers of damage liability in case of accident or theft and to assist in the enforcement and collection of judgments by requirements that bonds in designated amounts be posted by licensees, or by some other appropriate regulation. With respect to rate regulation, ordinance provisions merely endeavor to guard against fraudulent extortion of fees and misrepresentation involving the advertised schedule of rates. No attempt is made to determine an economic or equitable rate structure, but design, operation, and maintenance standards are frequently prescribed.<sup>39</sup>

One may conclude that the public control of commercial off-

<sup>38</sup> See LeCraw and Smith, *Municipal Regulation of Parking Lots*, Eno Foundation for Highway Traffic Control, 1949, and unpublished studies of the Bureau of Public Roads.

<sup>39</sup> Two model laws, involving the public regulation of commercial off-street parking facilities by cities, have been made available by the American Automobile Association. One is a state enabling statute; the other, a local ordinance that might be enacted pursuant to the statute. See "Proposed Statute to Define the Legal Obligations of Proprietors of Garages and Motor Vehicle Parking Facilities," and the "Proposed Ordinance Regulating Off-street Parking Facilities," issued by the American Automobile Association, Washington, D. C., 1950.

street parking facilities authorized under these laws may well be the forerunner of full-fledged public utility regulation of such facilities. As now constituted, of course, such regulation falls far short of effective public control of commercial parking facilities in a number of respects. The rate structure is frequently not designed to encourage short-term parking and discourage all-day storage, for example. Locations for new facilities, making parking space available where needed in relation to the principal generators of parking demand, are not prescribed. Certificates of convenience and necessity are not required. Competition is not controlled in the public interest. Facilities are not necessarily integrated with the over-all needs of the community. Other identifying characteristics of a public utility are largely absent.

### III. CONCLUSION.

It has been pointed out that the chief objectives to be attained in the governmental regulation of a public utility are adequate service and reasonable rates for the consuming public. As public utilities are inherently monopolistic, the consumer is without the usual alternative of patronizing some other dealer or producer rendering the same service. His best guarantee of adequate service and fair prices, under the circumstances, seems to lie in effective regulation by government authority. In the past, the outstanding legal characteristics of a public utility have been worked out to the point where it is clearly such if it (1) is affected with a public interest, (2) involves a public use, (3) has monopolistic attributes, and (4) is related to transportation or distribution. When measured in terms of these essential elements, it is amazing how easily the operation of off-street parking facilities would seem to qualify as a public utility, especially if it is appropriately identified as such by state legislative act.

It is true that the public regulation of designated public utilities is today an accepted fact. Yet it does not meet the unqualified approval of all. With some measure of justification, some critics disparage the partisanship that has often characterized the

conduct of state regulatory agencies. Others may feel that such regulation, as far as off-street parking facilities may be concerned, amounts to only a temporizing measure; that ultimately the municipality must own and operate all parking facilities in the public interest.

Certainly the public utility concept constitutes no panacea for all urban parking difficulties. It would seem to provide the promise of compromise, however, between the extremes of public and private control of off-street parking facilities in those municipalities where no action is forthcoming today. The qualification of parking facilities as public utilities seems so feasible legally that it warrants serious consideration by both public and private enterprisers. It may yet serve as the catalyst that will constrain these seemingly incompatible disputants to work together as a team in the public interest.

## NOTES AND COMMENTS

### HASTE MAKES FOR WORSE THAN WASTE

Scarcely a single day passes without some reference in the metropolitan newspapers to the "dope evil" or the "narcotics problem," for recent years have disclosed an appalling increase in the illegal use of narcotic drugs and a rising curve in the number of addicts. Worse yet, the age-level of those involved, both peddlers and consumers, has declined until the matter has now become one of those teen-age phenomena, one of those fads and fancies, which would border on the ridiculous if it were not for the tragic consequences so frequently found to follow in the train of drug addiction. From the smoking of marijuana on a "dare" to a steadily increasing consumption of heroin as the strength of the addiction grows leads but naturally to larceny, robbery and even more serious crime in order that the addict might secure the money to purchase larger and still larger quantities of "dope." Annual statistics relating to crime are not needed to arouse the citizenry in every large community to clamor for action, for law enforcing agencies, from police departments on down, have combined their talents, strength and energy to stamp out the drug evil.

The issue is not one new to lawyers and lawmakers, for, in addition to a federal Harrison Act<sup>1</sup> and a federal drug Export and Import Act,<sup>2</sup> many states enacted varying state laws on the subject.<sup>3</sup> The federal statutes, however, were primarily aimed at the production of revenue, although criminal sanctions were imposed on all who possessed or dispensed drugs without license or the payment of taxes, so local enforcement directed against addiction naturally varied from state to state. As usage of narcotic drugs became more and more a national problem, with corresponding entanglement of social and economic factors, the need for uniform state law became apparent.

With customary vigor, the Commissioners of Uniform Laws addressed themselves to the challenge and, in 1932, drafted a Uniform Narcotic Drug Act.<sup>4</sup> It would be difficult, wrote the Commissioners, for "one not familiar

<sup>1</sup> 26 U. S. C. A. § 2550 et seq.

<sup>2</sup> 21 U. S. C. A. § 171 et seq.

<sup>3</sup> Illinois, for example, enacted a narcotics law in 1931: Laws 1931, p. 455. It was repealed in 1935, and replaced by the Uniform Narcotic Drug Act: Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 192.1, et seq. The Illinois statute, prior to amendment, varied from the uniform law in a few particulars not here pertinent. As to its constitutionality, see *People v. Guagliata*, 362 Ill. 427, 200 N. E. 169, 103 A. L. R. 1035 (1936).

<sup>4</sup> See 9A *Unif. Laws Anno.*, pp. 182-224.

with the subject to understand how many different organizations and associations have an interest in the provisions of" the proposed act. It had to "protect those using narcotic drugs legally, as well as provide punishment for those using such drugs illegally." Great care "had to be exercised not to violate" treaty provisions regarding traffic in drugs, but at the same time to permit some leeway to the individual states to provide their "own methods for the care and cure of addicts."<sup>5</sup> In general, therefore, the proposed uniform law was directed against those who illegally sold, prescribed, administered, or dispensed narcotic drugs but the illegal possessor, manufacturer or compounder thereof was not overlooked. Punishment by fine or imprisonment, in varying amounts and for varying terms, in either local jails or state penitentiaries, was recommended as a suitable penalty. The comprehensive and carefully thought out uniform statute drafted by these Commissioners proved to be so acceptable to the state legislatures that, between 1932 and 1945, it was substituted for local variants in forty-five jurisdictions.<sup>6</sup>

The wisdom underlying the enactment of legislation of this type should be obvious to all. No one, in his right mind, would challenge either the motives or the sincerity of purpose of those who worked to put the measure on the statute books of the nation. For that matter, few would care to question the expertness of the draftsmanship to be found in the uniform law nor the successful culmination of the five years of careful thought and consideration which went into its makeup. One may, however, well express alarm when heedless individuals, whipped to a furor because of failure in law enforcement, rush headlong into the danger of ill-conceived and poorly thought out amendment, hastily enacted, of so well received a measure. Public discussion then becomes the citizen's duty in a democracy where freedom to think, speak and join in argument forms a cardinal principle of government, even though it be to think, speak and argue on the ill-favored side of the question.

Illinois has just experienced an illustration of the devastating consequences which can follow upon an unthinking, headlong, blind rush into legislative action at a time when few would wish to be quoted as being opposed to the spirit underlying the militant demand of organized pressure groups. In just thirty-seven days from the date of introduction to passage,<sup>7</sup>

<sup>5</sup> Commissioners' Prefatory Note to the Uniform Narcotic Drug Act, 9A Unif. Laws Anno., pp. 183-4.

<sup>6</sup> 9A Unif. Laws Anno., p. 182.

<sup>7</sup> House Bill No. 544 was introduced on March 28, 1951. It cleared both House and Senate by May 3, 1951, and, being declared to be an emergency measure, was placed in operation promptly upon the Governor's approval. Speed of passage can be best judged by noting that a bill must be read at large on three different days in both branches of the General Assembly and must be printed before a final vote is taken: Ill. Const. 1870, Art. III, § 13.

House Bill No. 544 has been added to existing legislation on the subject. Omitting stylistic phraseology, it reads:

"Section 1. Section 23 of the "Uniform Narcotic Drug Act," approved July 8, 1935, as amended, is amended to read as follows: Section 23. Whoever violates this Act by selling, prescribing, administering or dispensing any narcotic drug, shall be imprisoned in the penitentiary for a term of not less than one year nor more than five years for the first offense. Whoever violates this Act by possessing, having under his control, manufacturing or compounding any narcotic drug shall be fined for the first offense not more than \$5,000.00, or be imprisoned for a period of not less than one year nor more than five years, or both. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from two years to life.

"Whoever violates this Act by selling, prescribing, administering, or dispensing any narcotic drug to any person under 21 years of age, shall be imprisoned in the penitentiary for any term from two years to life.

"Whoever is authorized in this Act to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, who violates this Act by failing to comply with any provision prescribed in this Act for the exercise of such authority, for a first offense, shall be fined not more than \$1,000.00 or be imprisoned in the county jail for a term of not more than one year, or both; and for any subsequent offense shall be fined not more than \$3,000.00 or be imprisoned in the penitentiary for a term of not more than five years, or both.

"Any offense under this Act shall be deemed a subsequent offense if the violator shall have been previously convicted of a felony under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs."<sup>8</sup>

There is occasion to express grave doubts about the constitutionality of the measure<sup>9</sup> as well as to note no small amount of unconstitutionality in its enforcement.<sup>10</sup>

<sup>8</sup> Section 2 of House Bill No. 544, being the emergency clause, has been omitted.

<sup>9</sup> It being understood that the Governor had requested an opinion with regard thereto from the Attorney General, which request was probably made pursuant to Ill. Rev. Stat. 1949, Vol. 1, Ch. 14, § 4, inquiry was addressed to the latter for a copy of such opinion. The Attorney General replied to the effect that his opinion was a confidential communication to the chief executive of the state and not a matter of public concern unless released by the Governor. A similar request to the Governor was rejected.

<sup>10</sup> Chicago newspapers have reported at least two sentences to five-year terms in the city prison imposed by the Municipal Court of the City of Chicago. The jurisdiction of that court, for a single offense, is limited to "imprisonment otherwise than in the penitentiary." Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, § 357. To support imprisonment in the penitentiary, prosecution must be by indictment of a grand jury,



Examination of the uniform law discloses that the substantive definition of all offenses thereunder is provided by Sections 2, 3, 13 and 17 thereof and Section 20, equivalent to Section 23 of the Illinois version, was reserved for the purpose of prescribing the penalties and nothing more. There could be no constitutional criticism addressed to legislative action designed to increase the penalties for violation of the substantive provisions, provided the increased penalties were not given retroactive effect,<sup>11</sup> but House Bill No. 544 does not stop at that point. True, it does, in general, increase the penalty for selling, prescribing, administering, or dispensing any narcotic drug illegally to a present penalty of not less than one year nor more than five years in the penitentiary where formerly the statute called for a penalty by way of a maximum fine of \$1,000.00 or imprisonment in the county jail for no longer than one year, or both fine and imprisonment. The addition of certain habitual offender provisions may or may not be objectionable depending on whether the prior conviction was had before or after the effective date of the amended statute.<sup>12</sup> Since the holding of the Illinois Supreme Court in the case of *People v. Poppe*,<sup>13</sup> it would probably be futile to claim unconstitutionality in the addition of a paragraph defining the habitual offender as one who has previously been convicted of a felony "under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs," although interpretation may become necessary to decide whether "conviction" requires imprisonment in a penitentiary or not.<sup>14</sup> The chief vice, however, exists in certain other ideas injected into the phraseology of Section 23 as amended.

In the first place, a special and a new provision has been made for the offender guilty of "selling, prescribing, administering, or dispensing any narcotic drug to any person under 21 years of age" by fixing a minimum sentence of two years in the penitentiary with a maximum life sentence, in contrast to the general condemnation against selling, prescribing, administering or dispensing with its term of not less than one year nor more than five years for a first offense. Nowhere in the substantive provisions of the

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according to Ill. Const. 1870, Art. II, § 8, rather than by information or complaint, for the offense is then of the grade of felony: *Baits v. People*, 123 Ill. 428, 16 N. E. 483 (1888). There would seem to be a lack of jurisdiction to impose sentences of the kind noted.

<sup>11</sup> Ill. Const. 1870, Art. II, § 14, contains the customary guarantee against ex post facto legislation. No violation of U. S. Const., Amend. VIII, forbidding "cruel and unusual punishment," would appear to be involved.

<sup>12</sup> In *People v. Hanke*, 389 Ill. 602, 60 N. E. (2d) 395 (1945), it was held not to be objectionable to include a new offense in the category of habitual offenses even though the same was not so included at the time of the prior conviction.

<sup>13</sup> 394 Ill. 216, 68 N. E. (2d) 254 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 157.

<sup>14</sup> See *People v. Iagiello*, 403 Ill. 623, 87 N. E. (2d) 785 (1949).

statute is there any specific condemnation of the conduct as it might relate to victims "under 21 years of age." The absurdity of a statute calling for a punishment without designating a crime calls for no added comment.<sup>15</sup>

Even supposing the imposition of a different penalty to be constitutional, there is still the question of the appropriateness of the system of classification chosen by the legislature. The need for providing protection to minors, in contrast to saving adults from harm, might well justify the imposition of a heavier penalty on those who endanger the youthful portion of the population. But has the legislature, in its haste, forgotten that females become of age, in Illinois, for virtually every purpose,<sup>16</sup> when they attain eighteen? If the amendment to the Uniform Narcotic Drug Act has not changed the status of a female between eighteen and twenty-one, the indefiniteness and confusion generated should alone be enough to make the amendment void.

Again, whether by accident or design, the word "knowingly" has been omitted from the sentence in Section 23 which deals with the punishment to be imposed on one who possesses, has under his control, manufactures or compounds any narcotic drug. Whether accidental or deliberate, the omission would be just as deadly to validity. In *People v. Edge*,<sup>17</sup> a prosecution based upon an alleged violation of the statute forbidding the possession of policy tickets,<sup>18</sup> the conviction was reversed because of a failure to charge that the policy-playing tickets were knowingly possessed. In that regard, the court noted that the word "knowingly" is not supplied, in substance, by the term "unlawfully." It said: "Inclusion of the word 'unlawfully' merely connotes that the possession was contrary to or in defiance of law, whereas 'knowingly' implies that the act was performed consciously, intelligently, and with actual knowledge of the facts . . ."<sup>19</sup> Similarly, in *People v. Beak*,<sup>20</sup> where the constitutionality of a criminal statute was the prime issue, the court said that "in creating an offense by statute which was not a crime at common law such statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty . . . If the law is of such doubtful construction and describes the act denominated as a crime in terms so general and indeterminate as to make the question of criminality

<sup>15</sup> Compare, for example, the instant measure with Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 490, dealing with a contrast between the common law offense of forcible rape and statutory rape, involving offenders and victims at varying age levels.

<sup>16</sup> An exception existing in connection with the right to vote, Ill. Rev. Stat. 1949, Vol. 1, Ch. 46, § 3—1, rests on other grounds. A female, at eighteen, is qualified to serve as a notary public, for example: Ill. Rev. Stat. 1949, Vol. 2, Ch. 99, § 1.

<sup>17</sup> 406 Ill. 490, 94 N. E. (2d) 359 (1950).

<sup>18</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 413.

<sup>19</sup> 406 Ill. 490 at 494, 94 N. E. (2d) 359 at 361.

<sup>20</sup> 291 Ill. 449, 126 N. E. 201 (1920).

dependent upon the opinions of . . . individuals . . . and of such a nature that honest and intelligent men are unable to ascertain what particular act is condemned . . . the law is incapable of enforcement and will be held to be null and void."<sup>21</sup> True, a presumption of constitutionality attends upon every legislative enactment, but it would not be thought to be strong enough to overcome the effect of the obvious error committed at this point.

A further point might be made of the fact that the statute, as amended, fails to specify the place of detention where the optional sentence of imprisonment, which may be imposed on those who are found guilty of illegal possession of narcotic drugs, is to be served. In all other instances, there is express declaration that the term of imprisonment is to be "in the penitentiary," except as to those who, authorized to possess and use drugs, should fail to comply with the provisions regarding licensing, labelling, and record keeping.<sup>22</sup> Unless this failure may be said to be remedied by other general provisions in the statute book,<sup>23</sup> there would seem to be further obvious uncertainty to a degree warranting a determination of unconstitutionality, for no one can say whether the legislature intended to treat the offense as a felony or a misdemeanor. When the requirements of criminal procedure are kept in mind,<sup>24</sup> there is some occasion to believe that the proponents of the amendment, in their zeal to sharpen the teeth of the law, have overreached themselves. They have, in fact, endangered the whole scheme of the uniform law for, admitting the presence of a saving clause,<sup>25</sup> a determination that Section 23, as amended, is unconstitutional would leave the statute wide open to criticism as being nothing more than another utopian scheme lacking in practical effect.

While opinions may not differ as to the wisdom of seeking a change in existing law, if in fact it is inadequate to suppress the evil of traffic in, and use of, narcotic drugs, one may well be entitled to criticize the efforts of zealots, no matter how much they may be appalled by the increasing use of narcotic drugs, if their combined pressures have left the state exposed to the danger of being without any relief short of a special

<sup>21</sup> 291 Ill. 449 at 452, 126 N. E. 201 at 202.

<sup>22</sup> First offenders in that category are to be fined or "be imprisoned in the county jail."

<sup>23</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 585, declares a felony to be an offense "punishable with death or by imprisonment in the penitentiary." Other offenses, by Section 586, are declared to be misdemeanors.

<sup>24</sup> Prosecution for felony must be by indictment, Ill. Const. 1870, Art. II, § 8, hence must be heard only before the several circuit courts or by the Criminal Court of Cook County: *People v. Glowacki*, 236 Ill. 612, 86 N. E. 368 (1908).

<sup>25</sup> Section 22 of the Uniform Narcotic Drug Act provides that "if any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act, which can be given effect . . . and to this end the provisions of the act are declared to be severable." See also Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 192.25.

session of the legislature to provide the serious consideration the matter deserves. They ought to bear in mind Chief Justice Hughes' injunction to "look after the courts of the poor, who stand most in need of justice," for it is before such tribunals that drug peddlers and addicts most frequently appear. They need to be cautioned that the "security of the republic will be found in the treatment of the poor and ignorant; in indifference to their misery and helplessness lies disaster."

DANIEL A. WOLF\*

### THE VALUATION OF PROPERTY FOR ESTATE, GIFT AND INCOME TAX PURPOSES

Every student of economics fully realizes the fact that the value of property is never constant at all times, being materially, and often seriously, affected by periods of depression and recession as well as by those of inflationary character. For this reason, and because many transfers of property occur in the form of transfers in kind rather than in cash, it is often difficult, but highly important from the tax standpoint, to arrive at an accurate and proper valuation of property passing by way of inheritance, gift or otherwise.<sup>1</sup> As rules governing valuation vary with the type of property involved, rather than with the type of tax to be assessed, it is possible to consider such rules without particular reference to either estate, gift or income forms of taxation. For that matter, few instances exist where litigated questions concerning the valuation of property have turned on matters of law, for valuation is primarily a fact question to be resolved under the circumstances of the given case and to be decided upon the basis of the particular evidence produced. The essence of a case involving property valuation, then, is not the putting up of a strong legal argument but the proper presentation of all the relevant facts, strengthened by all pertinent data and buttressed by the use of opinion evidence furnished by those specialists whose expertness is beyond question.

The essential inquiry turns on the "fair market value" of the property on the taxable date. In general, that "fair market value" has been said to be the "price which would probably be agreed upon by a seller

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<sup>1</sup> In most instances income, for income tax purposes, is payable in cash and presents no valuation problem. Valuation may become a necessary step to a determination of taxable income where: (1) compensation, dividends or rents are payable in the form of property other than cash; (2) there is a distribution of stock rights; or (3) property is received by a shareholder upon liquidation of a corporation. Valuation problems could also arise in connection with an excess profits tax.

willing, but under no compulsion, to sell, and a buyer willing, but under no compulsion, to buy, where both have reasonable knowledge of the facts."<sup>2</sup> Factors to be taken into consideration, therefore, would typically group around three centers, to-wit: (1) the existence of a market for the property under consideration; (2) the representative character of sales made on that market; and (3) similarities and dissimilarities between the property so sold and the particular property in question. As valuation is a fact question, determinable from all proper evidence adduced, the Court of Appeals for the United States cannot question the determination, nor substitute its own judgment as to valuation, if the facts found by the Tax Court are supported by proper and substantial evidence, not even when, in the opinion of the higher court, the evidence points to a different conclusion.<sup>3</sup> It is obvious, therefore, that the principal effort should be put forth before the issue of valuation reaches the appellate level.

While value, at any given time, is a "fact," it is based upon a number of other facts such as the size, location and yield of real property, or the presence or absence of corporate earnings in the case of shares of stock. Despite its nature as a real, actual, definite thing, it is "an approximation, a matter of opinion, a guess, although that of informed people,"<sup>4</sup> hence turns largely on opinion. Because opinions do frequently differ, valuations based on substantial evidence are rarely rejected as courts are inclined to respect the soundly-formed opinions of others.<sup>5</sup> Conversely, property is rarely considered as being absolutely valueless, particularly for estate or gift tax purposes.<sup>6</sup>

It should be noted, of course, that the burden of proof as to correct and proper valuation lies on the taxpayer's shoulders. If the Commissioner

<sup>2</sup> *Phillips v. United States*, 12 F. (2d) 598 at 601 (1926). See also *John J. Newberry*, 39 BTA 1123 (1939); *Augustus E. Staley*, 41 BTA 752 (1940), appeal dis. C. C. A., 7th, 1940; and 28 U. S. C. A., §§ 11(b); 113(a) (4); 113(a) (5); 810-2; and 1005. For critical comment on the meaning of "value," see opinion of Frank, C. J., in *Andrews v. Commissioner*, 135 F. (2d) 314 at 317 (1943).

<sup>3</sup> *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 57 S. Ct. 324, 81 L. Ed. 491 (1937); *Phillips v. Commissioner*, 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931); *F. A. Gillespie & Sons Co. v. Commissioner*, 154 F. (2d) 913 (1946); *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990 (1939), cert. den. 308 U. S. 618, 60 S. Ct. 263, 84 L. Ed. 516 (1939); *Neal v. Commissioner*, 53 F. (2d) 806 (1931); *Tracy v. Commissioner*, 53 F. (2d) 575 (1931), cert. den. 287 U. S. 632, 53 S. Ct. 83, 77 L. Ed. 548 (1932); *Heiner v. Crosby*, 24 F. (2d) 191 (1928); *James Couzens*, 11 BTA 1040 (1928).

<sup>4</sup> *Montrose Cemetery Co. v. Commissioner*, 105 F. (2d) 238 (1939), affirmed in 309 U. S. 622, 60 S. Ct. 511, 84 L. Ed. 985 (1940). See also *Heiner v. Gwinner*, 114 F. (2d) 723 (1940), cert. den. 311 U. S. 714, 61 S. Ct. 396, 85 L. Ed. 465 (1940); *Andrews v. Commissioner*, 135 F. (2d) 314 (1943), cert. den. 320 U. S. 748, 64 S. Ct. 51, 88 L. Ed. 444 (1943); *Rockford Malleable Iron Works*, 2 BTA 817 (1925).

<sup>5</sup> *Meadow Land & Improvement Co. v. Commissioner*, 124 F. (2d) 297 (1941).

<sup>6</sup> *Burnet v. Logan*, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143 (1931); *Guggenheim v. Helvering*, 117 F. (2d) 469 (1941), cert. den. 314 U. S. 621, 62 S. Ct. 66, 86 L. Ed. 499 (1941).

expresses disagreement, he has the power to redetermine value and the resulting tax liability. For this purpose, he may have recourse to any proper evidence tending to establish value, such as the opinions of expert appraisers, reference to comparative sales, or purchase options given by the taxpayer. In case he does, the taxpayer is handicapped, for the Commissioner's assessment is presumed to be correct and the taxpayer would be forced to rebut the presumption.<sup>7</sup> To support a successful challenge to the correctness of a deficiency assessment made by the Commissioner, the taxpayer must produce evidence which would not only enable but also require the Tax Court to make an independent determination on the facts, particularly since, in the absence of such concrete facts, the presumption of correctness favoring the Commissioner would not be overthrown.<sup>8</sup>

The burden of proof resting on the taxpayer would appear to be heavier in the case of a suit to secure a tax refund than is true where review is sought, in the Tax Court, on a redetermination of valuation. Choice of procedure, therefore, should be given more than off-hand consideration. Negotiation of a closing agreement is possible where valuation controversies have led to consummated transactions, but the Commissioner will refuse to settle, as a matter of policy, where the proposed transaction is only in the planning stage.<sup>9</sup> One further general fact should be noticed, and that is the taxpayer should beware of the possibility of error in his own valuation, for he will generally be bound by the figure he himself has set<sup>10</sup> and can obtain relief only where he clearly committed the error.<sup>11</sup>

Proceeding now to specific illustrations regarding valuation problems, attention is at once drawn to the fact that value must be determined as of some particular date, the precise date depending on the purpose for the valuation. The particular date may be important in determining the per-

<sup>7</sup> *Helvering v. Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623 (1935); *Welch v. Helvering*, 290 U. S. 111, 54 S. Ct. 8, 78 L. Ed. 212 (1933); *Fleming v. Commissioner*, 153 F. (2d) 361 (1946); *Andrews v. Commissioner*, 135 F. (2d) 314 (1943), cert. den. 320 U. S. 748, 64 S. Ct. 51, 88 L. Ed. 444 (1943); *Allen v. Commissioner*, 117 F. (2d) 364 (1941); *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990 (1939), cert. den. 308 U. S. 618, 60 S. Ct. 263, 84 L. Ed. 516 (1939); *True v. United States*, 51 F. Supp. 720 (1943); *Mimnaugh v. United States*, 66 Ct. Cl. 411 (1928), cert. den. 280 U. S. 563, 50 S. Ct. 24, 74 L. Ed. 617 (1929); *Anson v. Prouty*, 5 BTA 107 (1926). See also Rule 32, Rules of Practice Before the Tax Court.

<sup>8</sup> *National Weeklies, Inc. v. Commissioner*, 137 F. (2d) 39 (1943); *Anthony P. Miller, Inc.*, 7 T. C. 729 (1946), affirmed in 164 F. (2d) 268 (1947), cert. den. 333 U. S. 861, 68 S. Ct. 741, 92 L. Ed. 1140 (1948); *Harriet A. Langdon*, 7 BTA 1142 (1927).

<sup>9</sup> 26 U. S. C. A. § 3760.

<sup>10</sup> *Andrews v. Commissioner*, 38 F. (2d) 55 (1930); *Thompson v. United States*, 8 F. (2d) 175 (1925); *Allie E. Nicholson*, 21 BTA 795 (1930); *Ethel P. Hunt*, 12 BTA 396 (1928).

<sup>11</sup> *Havemeyer v. United States*, 59 F. Supp. 537 (1945), cert. den. 326 U. S. 759, 66 S. Ct. 138, 90 L. Ed. 456 (1945); *Union Nat. Bank of Pittsburgh v. Driscoll*, 32 F. Supp. 661 (1940); *Estate of W. E. Telling*, T. D. Memo. 106694 (1944).

centage of gain or loss arising from the sale of property acquired before that date. It may have bearing on the value of the property, other than cash, received as taxable income. In case of gift taxes, the precise date of the gift might need to be determined. In estate tax cases, of course, the controlling date is the date of death of the decedent whose estate is subject to tax, unless the optional valuation date is utilized. Even though an appropriate date has been selected, the door is not closed to inquiry into future developments occurring after that date, for valuation has sometimes been based on prognostication as to future earnings or the prospects of future growth of the community where the property is located, since these factors have bearing on "fair market value."<sup>12</sup> Valuation generally, however, is measured by factors then in existence.

Real estate valuation is usually achieved on the basis of opinion testimony furnished by qualified experts or on appraisals provided by qualified appraisers. The expert or the appraiser must, of course, be shown to be familiar not only with the particular property involved but also with other properties of similar character. His opinion must also have been formulated on the basis of a proper approach before it will be accepted. To find recognition, the expert valuation should be predicated on facts not conclusions, on observable data and not "hunches."<sup>13</sup> The size and shape of the lot, its location, its actual or potential use, the footage fronting on important streets or avenues, the nature of zoning or similar restrictions, the size, age, and nature of existing improvements together with their state of repair or disrepair and their fitness for existing or particular uses, are all elements having bearing on value.<sup>14</sup> Improved premises, of course, should be valued as a unit for most purposes, although separate determinations as between the land value and the value of the improvements are necessary for the calculation of depreciation in income tax matters.<sup>15</sup> In the absence of special controlling factors disclosed by the evidence, an

<sup>12</sup> *Ithaca Trust Co. v. United States*, 279 U. S. 151, 46 S. Ct. 291, 73 L. Ed. 647 (1929); *Guggenheim v. Helvering*, 117 F. (2d) 469 (1941), cert. den. 314 U. S. 621, 62 S. Ct. 66, 86 L. Ed. 499 (1941); *Portage Silica Co. v. Commissioner*, 49 F. (2d) 985 (1931), cert. den. 284 U. S. 667, 52 S. Ct. 42, 76 L. Ed. 565 (1931); *Myer Dana*, 30 BTA 83 (1934); *James Couzens*, 11 BTA 1040 (1928).

<sup>13</sup> *F. A. Gillespie & Sons Co. v. Commissioner*, 154 F. (2d) 913 (1946); *Phipps v. Commissioner*, 127 F. (2d) 214 (1942), cert. den. 317 U. S. 645, 63 S. Ct. 38, 87 L. Ed. 519 (1942); *First Nat. Bank of Memphis v. Commissioner*, 125 F. (2d) 157 (1942); *Heiner v. Gwinner*, 114 F. (2d) 723 (1940), cert. den. 311 U. S. 714, 61 S. Ct. 396, 85 L. Ed. 465 (1940); *Beldridge Oil Co. v. Commissioner*, 85 F. (2d) 762 (1936); *Tracy v. Commissioner*, 53 F. (2d) 575 (1931), cert. den. 287 U. S. 632, 53 S. Ct. 83, 77 L. Ed. 548 (1932); *Boggs & Buhl, Inc. v. Commissioner*, 34 F. (2d) 859 (1929); *Overlander v. United States*, 67 Ct. Cl. 531 (1929); *First Nat. Bank of Birmingham (Schuler Trust)*, 29 BTA 352 (1933); *Joseph J. Walsh*, 7 BTA 1104 (1927).

<sup>14</sup> *Elizabeth P. Patterson*, 33 BTA 57 (1935); *John M. Galvin*, 6 BTA 1085 (1927).

<sup>15</sup> *Tracy v. Commissioner*, 53 F. (2d) 575 (1931), cert. den. 287 U. S. 632, 53 S. Ct. 83, 77 L. Ed. 548 (1932).

undivided fractional interest is usually valued at a proportionate share of the value of the whole.<sup>16</sup>

Comparative sales prices furnish desirable evidence of real estate value, provided the test sales are not made under compulsion, because they reflect the opinion of the market.<sup>17</sup> Offers to buy and sell, on the other hand, have little bearing on the question of value, being no more than evidence of the offeror's opinion on the point, hence will be regarded as inadmissible evidence when standing alone. When supported by additional evidence to the effect that the offer was made in good faith by a responsible buyer possessed of a full knowledge of the facts, evidence of that character may be received.<sup>18</sup> Rental value, or investment value, may not only be relevant but may be decisive, for earning power may furnish a reliable guide.<sup>19</sup> Assessed valuation may throw some light on the subject, but a person relying thereon should be prepared to prove that the tax assessor's judgment in the matter is based on full fair market value.<sup>20</sup> Book values, or actual or replacement values, have sometimes been utilized, but again they furnish inadequate proof unless tied up with fair value.<sup>21</sup>

Special valuation problems are encountered, from the income tax standpoint, in connection with mineral estates in land such as those relating to mines, oil and gas wells, and other natural resources,<sup>22</sup> as well as in the case of all types of tax where the interest acquired is less than a fee simple. Leasehold interests may possess a value if there is an annual saving arising from the ownership of the leasehold interest. Value is then calculated on the basis of capitalizing the amount of the savings. But this

<sup>16</sup> *Adelaide McColgan*, 10 BTA 958 (1928); *Clifford A. Cook*, 2 BTA 126 (1925); *Estate of Johnson*, TC Memo. Dkt. No. 111795 (1943).

<sup>17</sup> *Tracy v. Commissioner*, 53 F. (2d) 575 (1931), cert. den. 287 U. S. 632, 53 S. Ct. 83, 77 L. Ed. 548 (1932); *Huron Building Co.*, 15 BTA 1107 (1929).

<sup>18</sup> *Sharp v. United States*, 191 U. S. 341, 24 S. Ct. 114, 48 L. Ed. 211 (1903); *South Alabama Land Co. v. Commissioner*, 104 F. (2d) 27 (1930); *Manufacturers Paper Co. v. Commissioner*, 89 F. (2d) 684 (1937).

<sup>19</sup> See cases cited in note 17, ante, and *Montrose Cemetery Co. v. Commissioner*, 105 F. (2d) 238 (1939), affirmed in 309 U. S. 622, 60 S. Ct. 511, 84 L. Ed. 985 (1940).

<sup>20</sup> *Tabor Manufacturing Co. v. Commissioner*, 34 F. (2d) 140 (1929).

<sup>21</sup> *Guggenheim v. Rasquin*, 312 U. S. 254, 61 S. Ct. 507, 85 L. Ed. 813 (1941); *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990 (1939), cert. den. 308 U. S. 618, 60 S. Ct. 263, 84 L. Ed. 516 (1939); *South Alabama Land Co. v. Commissioner*, 104 F. (2d) 27 (1930); *Morrisdale Coal Co. v. Commissioner*, 97 F. (2d) 272 (1938); *Henry Cleland Estate Co.*, 29 BTA 436 (1933); *Estate of Jeremiah P. Downing*, 12 BTA 1180 (1928); *Lexington Realty Co.*, 12 BTA 850 (1928); *Jerecki Mfg. Co.*, 12 BTA 165 (1928). For estate and gift tax purposes, only the net value of the property transferred is taken into consideration as the taxpayer is entitled to deduct the unpaid amount of any mortgage or other charge and, in the case of estate taxes, all other debts and claims against the estate: *Smith v. Shaughnessy*, 318 U. S. 176, 63 S. Ct. 545, 87 L. Ed. 690 (1943).

<sup>22</sup> For the law on this specialized subject, see *Morrisdale Coal Co. v. Commissioner*, 97 F. (2d) 272 (1938); *A. G. & S. Mining Co.*, 8 BTA 1260 (1927); *Olinda Land Co.*, TC Memo. Dkt. No. 23 (1945); and Reg. 111, § 29.23(m)-7.



is true only if the rights granted exceed, in value, the amount of the payments required or other obligations imposed on the lessee, for otherwise the leasehold interest would not possess a market value.<sup>23</sup>

The valuation of personal property follows closely along the line laid down for real estate valuation, the prime issue being to determine the "fair market value" thereof on the controlling date. Most of the litigated questions, however, have arisen in connection with the valuation of intangible personal property such as shares of stock, notes and mortgages. Fair market value for such property, of course, is generally the amount of cash which could be realized under a free and unhampered sale.<sup>24</sup> Active listed securities typically will be valued on the basis of a mean between the high and low prices recorded on the exchange on the particular day, or on a date closest thereto, since the sales there recorded most closely reflect the presence of a free market between willing sellers and buyers.

Inactive or unlisted issues are likely to present problems by reason of the difficulty of finding an acceptable comparative basis. Other sales made on days too remote from the valuation date will be disregarded,<sup>25</sup> as would also be the case with respect to sales not made at arm's length.<sup>26</sup> Clearly, then, prices obtained under forced or compulsory sales should not be recognized<sup>27</sup> any more than should be true where the case discloses a manipulated, misinformed or an exhausted market.<sup>28</sup> Courts will also be reluctant to disregard market prices on the basis of argument that such prices have been unduly affected by boom or depression, but may yield if strong evidence can be produced to overcome such reluctance.<sup>29</sup> The valua-

<sup>23</sup> *Bonwit Teller & Co. v. Commissioner*, 53 F. (2d) 381 (1931), cert. den. 284 U. S. 690, 52 S. Ct. 266, 76 L. Ed. 582 (1932); *William Penn Hotel Co.*, 23 BTA 566 (1931); *Polar Ice Cream & Supply Co.*, 13 BTA 1054 (1928); *Mandel Bros.*, 4 BTA 341 (1926).

<sup>24</sup> *W. T. Grant Co. v. Duggan*, 94 F. (2d) 859 (1938); *Hazeltine Corp. v. Commissioner*, 89 F. (2d) 513 (1937); *Commissioner v. Robertson*, 75 F. (2d) 540 (1935), cert. den. 295 U. S. 763, 55 S. Ct. 922, 79 L. Ed. 1705 (1935); *Walter v. Duffy*, 287 F. 41 (1923); *Union Nat. Bank of Pittsburgh v. Driscoll*, 32 F. Supp. 661 (1940); *Estate of Spencer*, 5 TC 904 (1945); *Augustus E. Staley*, 41 BTA 752 (1940); appeal dis. C. C. A., 7th; *John J. Flynn*, 35 BTA 1064 (1937).

<sup>25</sup> *True v. United States*, 51 F. Supp. 720 (1943); *Julius G. Day*, 3 BTA 942 (1926).

<sup>26</sup> *Kinney's Estate v. Commissioner*, 80 F. (2d) 568 (1935); *True v. United States*, 51 F. Supp. 720 (1943); *Mathilde B. Hooper*, 41 BTA 114 (1940); *Gillette Rubber Co.*, 31 BTA 483 (1934); *Premier Packing Co.*, 12 BTA 637 (1928).

<sup>27</sup> *C. A. Bryan*, 19 BTA 111 (1930); *Fruen Investment Co.*, 2 BTA 542 (1925).

<sup>28</sup> *Zanuck v. Commissioner*, 149 F. (2d) 714 (1945); *Andrews v. Commissioner*, 135 F. (2d) 314 (1943), cert. den. 320 U. S. 748, 64 S. Ct. 51, 88 L. Ed. 444 (1943); *Continental Oil Co. v. United States*, 62 F. Supp. 876 (1945), cert. den. 328 U. S. 847, 66 S. Ct. 1118, 90 L. Ed. 1620 (1946); *Estate of Millie Langley Wright*, 43 BTA 551 (1941); *Wallis Tractor Co.*, 3 BTA 981 (1926); *John J. Batterman*, T. C. Memo. Dkt. No. 110244 (1943), affirmed in 142 F. (2d) 448 (1944), cert. den. 322 U. S. 756, 64 S. Ct. 1266, 88 L. Ed. 1585 (1944); *Estate of Telling*, T. C. Memo. Dkt. No. 106694 (1944).

<sup>29</sup> *Rogers v. Strong*, 72 F. (2d) 455 (1934), cert. den. 293 U. S. 621, 55 S. Ct. 217, 79 L. Ed. 709 (1934); *Crane v. Harrison*, 68 F. Supp. 439 (1946).

tion of large blocks of stock on the basis of sales prices obtained for small lots would be improper because of the presence of unusual factors in the case of the former.<sup>30</sup> For this reason, a "blockage rule" has been formulated<sup>31</sup> which should be taken into account.<sup>32</sup>

In the absence of market valuation, stocks may be valued by comparison with shares of similar enterprises possessing a market sales value,<sup>33</sup> or by reference to internal data relating to the particular corporation whose shares are involved. For this last purpose, such factors as net asset value, earning power, dividend-paying capacity, both past and prospective, and book value of shares may become important. Offers and options to purchase shares may be considered in an effort to arrive at a fair value.<sup>34</sup> Conversely, the presence of valid restrictions on the sale of shares should be noted for these may materially affect value by limiting the potential market.<sup>35</sup>

Other securities, such as notes and mortgages, will generally be valued on the basis of the amount of unpaid principal plus interest accrued to the valuation date. In the case of notes, attention should be given to such factors as (1) collectibility or subsequent actual collection, if had; (2) the terms of the note, including the element of negotiability; and (3) the presence or absence of collateral security and the worth thereof.<sup>36</sup> To these

<sup>30</sup> *Hazeltine Corp. v. Commissioner*, 89 F. (2d) 513 (1937); *Wood v. United States*, 29 F. Supp. 853 (1939); *Estate of Vandenhoeck*, 4 TC 125 (1944); *In re Leadbetter*, TC Memo. Dkt. No. 110858 (1943).

<sup>31</sup> Reg. 111, § 29.113(a)(14)-1; Reg. 108, § 86.14(c); Reg. 105, § 81.10(c).

<sup>32</sup> See *Richardson v. Commissioner*, 151 F. (2d) 102 (1946), cert. den. 326 U. S. 796, 66 S. Ct. 490, 90 L. Ed. 485 (1946); *Mott v. Commissioner*, 139 F. (2d) 317 (1943); *Helvering v. Safe Dep. & Trust Co. of Baltimore*, 95 F. (2d) 806 (1938); *Henry F. DuPont*, 2 TC 246 (1943); *John J. Newberry*, 39 BTA 1123 (1939); *James Couzens*, 11 BTA 1040 (1928).

<sup>33</sup> *Virginia v. West Virginia*, 238 U. S. 202, 35 S. Ct. 795, 59 L. Ed. 1272 (1915); *Cotton v. Commissioner*, 165 F. (2d) 987 (1948); *Horlick v. Kuhl*, 62 F. Supp. 168 (1945); *Frederick A. Koch, Jr.*, 28 BTA 363 (1933); *Rose Spitzer*, TC Memo. Dkt. No. 7551 (1947). See also Reg. 108, §§ 113(a)(14); 811(k); 86.19(o); 29.113(a)(14)-1; and Reg. 108, § 81.10(c).

<sup>34</sup> *Commissioner v. McCann*, 146 F. (2d) 385 (1944); *Wilson v. Bowers*, 57 F. (2d) 682 (1932); *Cartier v. Commissioner*, 37 F. (2d) 894 (1930); *Rice v. Eisner*, 16 F. (2d) 358 (1926), cert. den. 273 U. S. 764, 47 S. Ct. 477, 71 L. Ed. 880 (1927); *George B. Markle, Jr.*, 10 BTA 763 (1928).

<sup>35</sup> *Helvering v. Salvage*, 297 U. S. 106, 56 S. Ct. 375, 80 L. Ed. 511 (1936); *Commissioner v. McCann*, 146 F. (2d) 385 (1944); *Heiner v. Gwinner*, 114 F. (2d) 723 (1940), cert. den. 311 U. S. 714, 61 S. Ct. 396, 85 L. Ed. 465 (1940); *LaMotte T. Cohu*, 8 TC 796 (1947); *Edith G. Goldwasser*, 47 BTA 445 (1942), affirmed in 142 F. (2d) 556 (1944), cert. den. 323 U. S. 765, 65 S. Ct. 119, 89 L. Ed. 612 (1944), rehear. den. 324 U. S. 890, 65 S. Ct. 1020, 89 L. Ed. 1437 (1945).

<sup>36</sup> *Estate of Oliver v. Commissioner*, 148 F. (2d) 210 (1945); *McLaughlin v. Commissioner*, 113 F. (2d) 611 (1940); *Rusk v. Commissioner*, 53 F. (2d) 428 (1931); *Nichols v. Commissioner*, 44 F. (2d) 157 (1930); *Estate of Hodge*, 2 TC 643 (1943); *Estate of Springer*, 45 BTA 561 (1941); *Mary M. Buck*, 25 BTA 780 (1932); *I. N. Burman*, 23 BTA 369 (1931); *S. L. Meyer*, 23 BTA 1201 (1931); *John Laing*, 22 BTA 380 (1931); *Paul M. Potter*, TC Memo. Dkt. No. 7473 (1946); and Reg. 105, § 81.10(1); Reg. 108, § 86.19(e).

factors, in the case of mortgages, should be added all available information relating to trends in the general mortgage market.<sup>37</sup> The worth of securities pledged as collateral to secure indebtedness must be included in the deceased owner's gross estate at full market value, but credit for the outstanding indebtedness may be taken as a claim against the estate.<sup>38</sup>

This brief summary should serve to emphasize the point, previously noted, that valuation is essentially a fact question, hence the marshalling and preserving of all pertinent data is a matter of prime importance. The attorney should be prepared to substantiate all valuations made with acceptable documentary evidence as well as with convincing and admissible testimony.

JOSEPH BERMAN\*

<sup>37</sup> *Lehigh Bldg. Corp.*, 7 BTA 460 (1927); *Leon N. Dibble*, 6 BTA 732 (1927); *Estate of Rosenbaum*, TC Memo. Dkt. No. 2711 (1944).

<sup>38</sup> *Lyman v. Commissioner*, 83 F. (2d) 811 (1936); *Hartford Nat. Bank & Trust Co. v. Smith*, 54 F. Supp. 579 (1940); *Estate of Borland*, 38 BTA 598 (1938); Reg. 105, § 81.10(c).

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## DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS—WHETHER SEGREGATION ORDINANCES WHICH PROHIBIT PERSONS OF DIFFERENT RACES OR COLOR FROM LIVING IN THE SAME LOCALITY ARE CONSTITUTIONAL—The case of *City of Birmingham v. Monk*,<sup>1</sup> recently decided by the Court of Appeals for the Fifth Circuit, presented for adjudication a question concerning the constitutionality of a segregation zoning ordinance adopted by the municipality there concerned. The action was one to secure a declaratory judgment of

<sup>1</sup> 185 F. (2d) 859 (1951). Russell, J., wrote a dissenting opinion. It is understood that certiorari has been denied.

invalidity on the ground the ordinance, one making it unlawful for any person of either the white or negro race to establish a residence in an area zoned for members of the other race, violated rights guaranteed to the plaintiffs by the Fourteenth Amendment and by certain civil rights legislation.<sup>2</sup> Plaintiffs were Negroes who had purchased residential property within the city but which was located in a section where occupation was limited, by the ordinance, to members of the white race. The district court declared the ordinance to be void and enjoined enforcement thereof on the principle that the provision was not a legitimate exercise of the police power. The defendant municipality appealed asserting error in the exclusion of evidence tending to show breach of the peace, riots, and destruction of property and life which neither it nor other law enforcement officers could prevent. Such evidence had been offered to justify the enactment as being no more than a reasonable exercise of the police power. The majority of the higher court, voting to affirm the decree, stated that no state or municipality could exercise its police power in such a way as to bring it into direct conflict with the federal constitution, hence the ordinance could not possibly be valid. The dissenting judge, willing to treat the evidence as being admissible for its possible bearing on the issue of whether or not the particular ordinance was unconstitutional, pointed to the fact that other constitutional rights have been restricted when the circumstance required it, confirming his argument by quoting Justice Holmes' celebrated remark that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>3</sup>

A query as to the constitutionality of segregation zoning ordinances has served as the threshold of inquiry before many courts, but while the problem is not a new one, the decisions have been at variance with each other. The case of *In re Lee Sing*<sup>4</sup> represents one of the earliest tests of enactments of the kind in question. It concerned the so-called "Bingham" ordinance passed by the City of San Francisco, an ordinance which required all Chinese inhabitants to move from a portion of the city previously occupied by them to a point outside the city and county. The court, declaring the ordinance to be violative of the Fourteenth Amendment, pointed out that the obvious purpose was to drive away all citizens of Chinese ancestry without being aimed at any particular vice or unwholesome or immoral practice so was not designed to effectuate any legitimate

<sup>2</sup> 8 U. S. C. A. §§ 41-2.

<sup>3</sup> *Schenck v. United States*, 249 U. S. 47 at 52, 39 S. Ct. 247, 63 L. Ed. 470 at 473 (1919).

<sup>4</sup> 43 F. 359 (1890). The court intimated that if there had been evidence of existing vice and other unwholesome practices the ordinance might have been sustained.

police power of the city. So bald an affront to civil rights could hardly be expected to stand.

A *ansi prius* decision rendered in Virginia in 1913, however, reached a directly opposite conclusion for it was there found that an ordinance which prohibited persons of the white and colored races from living in the same locality was a valid and proper exercise of the police power because intended to preserve peace and good order.<sup>5</sup> To reach that result, the court took judicial notice of the fact that close association on the part of the persons designated had resulted, or tended to result, in breach of the peace, immorality and danger to the health of the community.<sup>6</sup> Judicial notice there served as the foundation for a showing of a reasonable relation between the segregation ordinance and the exercise of the police power. It could be considered analogous to the proof which the dissenting judge was willing to admit in the instant case.

A later Virginia case, that of *Hopkins v. City of Richmond*,<sup>7</sup> followed the pattern laid down when it upheld another segregation ordinance. At that time it said: "Whether a particular ordinance is unreasonable, and therefore void, is a question for the court, but in determining it the court will have regard to all the circumstances of the city and the objects sought to be attained, and the necessity which exists for the ordinance."<sup>8</sup> To that point, then, it would seem as if evidence tending to disclose a vital need for the segregation plan in a given community would lead to the conclusion that the particular regulation might be held valid.

Other segregation ordinances have failed to stand the test but for other reasons. The one concerned in *State of Maryland v. Gurry*<sup>9</sup> was declared void because it was said to be unreasonable in the light of the general welfare clause of the city charter. There was indication, however, that but for such welfare clause the ordinance would have been sustained for the court adverted to the friction which had developed from occupancy by colored persons of houses in areas previously occupied entirely by white people and the reasonableness of seeking to prevent conflict if that was possible. The court also pointed to the fact that the Fourteenth Amendment, while broad and comprehensive, was not designed to interfere with a proper exercise of the police power.

In much the same way, the ordinance involved in the North Carolina

<sup>5</sup> *Ashland v. Coleman*, 19 Va. L. Reg. 427 (1913).

<sup>6</sup> Accord: *Hopkins v. City of Richmond*, 117 Va. 692, 86 S. E. 139 (1915); *Harden v. City of Atlanta*, 147 Ga. 248, 93 S. E. 401 (1917).

<sup>7</sup> 117 Va. 692, 86 S. E. 139 (1915). Keith, J., dissented.

<sup>8</sup> 117 Va. 692 at 708-9, 86 S. E. 139 at 144.

<sup>9</sup> 121 Md. 534, 88 A. 546, 47 L. R. A. (N. S.) 1087 (1913).

case of *State v. Darnell*<sup>10</sup> was declared void for violation of the general welfare clause of the city charter, making it unnecessary for the court to go deeper into the constitutional issues. It did say, however, that as such an ordinance would tend to forbid an owner of property from selling or leasing to whomsoever he might see fit there might be occasion to find constitutional objection to an ordinance which took away "one of the inalienable rights incident to the ownership of property."<sup>11</sup>

The earlier Georgia cases appear to have gone deeper into the constitutional issues concerned, but again the inquiry was not directed to the exercise of the police power. In *Carey v. City of Atlanta*<sup>12</sup> the ordinance was stricken down because it would have operated to deprive one who was already the owner of property of the right to reside therein, which deprivation would, in substance, amount to an unjustified taking of the property itself. Upon repassage of the ordinance with a clause expressly excluding from its operation those persons who had acquired vested rights, the ordinance was held valid, in *Harden v. City of Atlanta*,<sup>13</sup> over the dissent of the judge who had written the earlier opinion but who this time objected that the new ordinance was objectionable because it was opposed to a basic principle in denying one the right to acquire a home of his choice simply on the basis of his race or color.

The death blow to ordinances of this character seemed to fall with the decision of the United States Supreme Court in the case of *Buchanan v. Warley*,<sup>14</sup> a suit brought by a white person, as seller, to compel specific performance of a real estate contract relating to land in Louisville, Kentucky. The defendant, a Negro purchaser, resisted suit on the ground that a local ordinance would have made it unlawful for him to occupy the premises. The United States Supreme Court expressed the question to be one as to whether or not occupancy, and necessarily the purchase and sale of property of which occupancy was but an incident, could be inhibited by a state or one of its municipalities solely because of the color of the proposed occupant.<sup>15</sup> It answered that question with an emphatic declaration that the Fourteenth Amendment was specifically designed to assure

<sup>10</sup> 166 N. C. 300, 81 S. E. 338, 51 L. R. A. (N. S.) 332 (1914).

<sup>11</sup> 166 N. C. 300 at 302, 81 S. E. 338 at 339.

<sup>12</sup> 143 Ga. 192, 84 S. E. 456, L. R. A. 1915D 684, Ann. Case. 1916E 1151 (1915).

<sup>13</sup> 147 Ga. 248, 93 S. E. 401 (1917). Atkinson, J., wrote a dissenting opinion.

<sup>14</sup> 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C 210, Ann. Cas. 1918A 1201 (1917), reversing *Harris v. City of Louisville*, 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B 149 (1915).

<sup>15</sup> 245 U. S. 60 at 75, 38 S. Ct. 16, 62 L. Ed. 149 at 161. The preamble of the ordinance recited that the purpose was "to prevent conflict and ill-feeling between the white and colored races" and to "preserve the public peace and promote the general welfare by making reasonable provisions requiring as far as practicable the use of separate blocks for residences . . . by white and colored people respectively."

equal right to all, regardless of color, to inherit, purchase, lease, sell, hold and convey real and personal property, and that any municipal ordinance which purported to place restriction thereon was void.<sup>16</sup> On the authority of that decision, all subsequent cases have usually produced a summary declaration of invalidity as to those segregation ordinances which have been brought into question.<sup>17</sup>

The decision in the Buchanan case as well as those holdings which follow it have not gone without criticism<sup>18</sup> particularly as to the true point of conflict between certain of the city councils and the Supreme Court. The issue would not, as the court says, seem to be "solely" one of restriction based on color or race but would rather involve the larger question of segregation versus police power. The former would attempt to justify the separation of the races by showing the incidence of riots and breaches of the peace which can, and often does, flow from close association.<sup>19</sup> The latter, more recently concerned with individual rather than public rights, has tended to jump over the crux of the problem without full examination thereof and to adjudge this and other forms of segregation on the basis that all are *ipso facto* unconstitutional. If the real test of all zoning, racial or otherwise, is the proper preservation of that public welfare which is intimately involved, there should be some conscious examination into that point before proceeding to pass on other constitutional issues. Granted that no ordinance should stand if its sole purpose is to discriminate, there is still occasion to give some heed to other aspects of state power.

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<sup>16</sup> Following that decision, the Atlanta ordinance which had been reviewed in *Harden v. City of Atlanta*, 147 Ga. 248, 93 S. E. 401 (1917), was again tested in *Glover v. City of Atlanta*, 148 Ga. 285, 96 S. E. 562 (1918), and this time was declared invalid. On similar reasoning, an ordinance of the type upheld in *Hopkins v. City of Richmond*, 117 Va. 692, 86 S. E. 139 (1915), was rejected in *Irvine v. City of Clifton Forge*, 124 Va. 781, 97 S. E. 310 (1918).

<sup>17</sup> *City of Richmond v. Deans*, 281 U. S. 704, 50 S. Ct. 407, 74 L. Ed. 1128 (1930), affirming 37 F. (2d) 712 (1930); *Harmon v. Tyler*, 273 U. S. 668, 47 S. Ct. 471, 71 L. Ed. 831 (1927), reversing 158 La. 439, 104 So. 200 (1925); *Bowen v. City of Atlanta*, 159 Ga. 145, 125 S. E. 199 (1924); *Jackson v. State*, 132 Md. 311, 103 A. 910 (1918); *Clinard v. City of Winston-Salem*, 217 N. C. 119, 6 S. E. (2d) 867, 126 A. L. R. 634 (1940); *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. (2d) 1054 (1936); *City of Dallas v. Library Annex Corp.*, 295 S. W. 591 (Tex. Comm. App., 1927).

<sup>18</sup> Martin, "Segregation of Residences of Negroes," 32 Mich. L. Rev. 721-42 (1933), and notes in 29 Ky. L. J. 213, 16 Mich. L. Rev. 109, 35 Mich. L. Rev. 137.

<sup>19</sup> A recent Associated Press dispatch reports the destruction by fire of two houses in Birmingham, Alabama, which had been bombed during a racial zoning dispute arising when Negroes began moving into an area formerly zoned for white occupancy: *Chicago Tribune*, Vol. CX, No. 109, Part 4, p. 1, May 7, 1951. The story does not reveal whether the premises concerned are the same as the ones involved in the instant case.



CONTRACTS—REQUISITES AND VALIDITY—WHETHER OR NOT A BANK MAY, BY AGREEMENT WITH ITS CUSTOMER, COMPLETELY EXONERATE ITSELF FROM LIABILITY FOR ITS NEGLIGENCE IN MAINTAINING A NIGHT DEPOSITORY—While reviewing courts in this country have frequently been presented with the question of the validity of bailment contracts which purport to limit the liability of a bailee for his negligence, definitiveness hardly characterizes the result of decisions thus far attained. Taken together, however, the cases do indicate an apparent trend, one exemplified by the recent Ohio case of *Kolt v. Cleveland Trust Company*.<sup>1</sup> The defendant there, a bank which provided night depository facilities to its customers, entered into a written agreement with the plaintiff permitting him to use its facilities for the payment of a fee. The contract provided that the use of the depository by the plaintiff was to be at his sole risk and stipulated that the relationship of debtor and creditor should not arise out of such use. The plaintiff brought action to recover for a deposit allegedly made by him but receipt of which was denied by the defendant. At the time of submitting the case to the jury, the lower court instructed that if the plaintiff had shown, by a preponderance of the evidence, that he had placed the money in question in the night depository, it was then incumbent upon the defendant bank to show that it had exercised ordinary care over the custody of the money and also directed the jury to ignore any provision in the contract to the contrary. The Ohio Court of Appeals, on appeal from a verdict and judgment against the bank, after determining that the relationship between the parties was one of bailor and bailee, held the instruction to be erroneous on the ground that the bank was absolved from liability by the terms of the agreement and that the public policy of the state was not opposed to enforcing such a provision under the circumstances before it.

Although it would appear that no reviewing court in this country has ever been called upon to consider the point of law concerned as it relates to the specific facts of the case,<sup>2</sup> the question of the ability of contracting parties generally, and especially of parties to bailment contracts, to exonerate themselves from liability for their negligent acts committed while in the performance of such contracts has been the subject of many decisions. One of the first cases to raise the problem was the English case of *Maving v. Todd*<sup>3</sup> where, by agreement of the parties, the defendant was relieved from liability for any loss which might result from fire. Lord Ellenborough is there reported to have held that "a wharfinger . . . may entirely get rid

<sup>1</sup> — Ohio App. —, 93 N. E. (2d) 788 (1950). McNamee, J., wrote a dissenting opinion.

<sup>2</sup> But see *Bernstein v. Northwestern Nat. Bank in Philadelphia*, 159 Pa. Super. 73, 41 A. (2d) 440 (1945), for dicta intimating the possibility that a bank, providing a night depository, might limit its liability to a depositor by agreement.

<sup>3</sup> 4 Camp. 225, 171 Eng. Rep. 72 (1815).

of his liability for loss by fire." Claiming descent from that case, there is a seemingly settled area of English law which appears to champion the right of a bailee to exonerate himself by agreement from any liability for his negligence.<sup>4</sup>

American courts, on the other hand, have viewed these exoneration agreements with a degree of hostility, crediting their position to an expression of public policy.<sup>5</sup> The basis for that policy has not always been entirely clear, but it would appear that courts have feared that if a bailee for hire was allowed to free himself from that duty to exercise ordinary care which the law would normally impose upon him the result would be to produce a tendency to perform contracts containing such stipulations in a careless fashion.<sup>6</sup> In opposition to this position, however, is an equally well established policy permitting the utmost freedom of contract to competent parties which presents, with force, the counter-argument that what one may refuse to do entirely, he may well agree to do but conditionally.<sup>7</sup> Apparently both these policies are sufficiently persuasive that courts are still engaged in the process of resolving the conflict thus presented.

The first reaction of American courts when faced with the problem of resolving these opposing policies seems to have been one of reluctance to meet the issue squarely and to rule on the essential validity of the exoneration provisions involved in the agreements coming before them. Instead, and as an alternative, the principle of strict construction was adopted, so that unless freedom from liability for negligence was expressly included, contracts were to be construed as if they made no reference to it.<sup>8</sup> This was clearly an effort to achieve solution by evasion for, in many cases, the particular stipulation was rendered meaningless after the element of freedom from negligence was obliterated because not precisely framed in apt language. Although the Arkansas court concerned with the case of *Gulf Compass Company v. Harrington*<sup>9</sup> recognized this to be the case, it never-

<sup>4</sup> See, for example, *Rutter v. Palmer* (1922), 2 K. B. 87, 14 B. R. C. 101; *Travers & Sons v. Cooper* (1915), 1 K. B. (C. A.) 73.

<sup>5</sup> *England v. Lyon Fireproof Storage Co.*, 94 Cal. App. 562, 271 P. 532 (1928); *Denver Union Terminal Co. v. Cullinan*, 72 Colo. 248, 210 P. 602, 27 A. L. R. 154 (1922); *Mallone v. Santora*, 135 Conn. 294, 64 A. (2d) 51 (1949); *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 58 N. E. (2d) 658 (1944).

<sup>6</sup> Such an apprehension was voiced in *Kenney v. Wong*, 81 N. H. 427, 128 A. 343 (1925).

<sup>7</sup> *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721 (1903).

<sup>8</sup> *Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664 (1904); *Pure Torpedo Corp. v. Nation*, 327 Ill. App. 28, 63 N. E. (2d) 600 (1945); *Weinberger v. Werremeyer*, 224 Ill. App. 217 (1922); *Woodward v. Royal Carpet Cleaning Co.*, 16 La. App. 555, 134 So. 443 (1931); *Railton v. Taylor*, 20 R. I. 300, 38 A. 980 (1897); *Langford v. Nevin*, 117 Tex. 130, 298 S. W. 536 (1937). But see *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721 (1903), where the court held it was error to fail to construe a typical exoneration clause as intended to include negligence.

<sup>9</sup> 90 Ark. 256, 119 S. W. 249, 23 L. R. A. (N. S.) 1205 (1909).

theless applied the rule of strict construction toward a warehouse receipt which purported to relieve the warehouseman from liability for loss resulting from fire, thereby denying protection of the immunity clause where the fire had resulted from the warehouseman's own negligence. It said, in part, that it might be argued that this construction entirely emasculated the stipulation and rendered it meaningless. Nevertheless, it continued, the "argument affords no reason for importing into the contract a stipulation for exemption from liability for negligence which the parties themselves have not seen fit to express in apt words—a stipulation, too, which the law at least discourages when it does not positively forbid."<sup>10</sup> The case may be said to reflect a typical approach to the subject but one hardly likely to aid in developing the law on the point.

An area of compromise has been reached, in resolving the conflict between the so-called "public policy" and the one respecting freedom of contract, in those cases wherein bailees for hire have been allowed the benefit of exculpatory language designed to limit the monetary extent of liability, provided the limitation bears a reasonable relation to the value of the bailed article and the consideration paid the bailee for his services. Typical of these situations are those cases which involve persons engaged in the business of checking parcels.<sup>11</sup> Although such persons would be liable for negligent harms inflicted up to the stipulated amount, the granting of validity to stipulations designed to exonerate from liability for any excess damage, even when caused by the bailee's own negligence, represents a broad concession.

Closely related thereto are those cases in which the courts have recognized the validity of agreements intended to limit a bailee's liability to the amount of the declared valuation of the bailed article.<sup>12</sup> Such agreements are generally employed where a graduated fee is charged by the bailee commensurate with the declared value of the property, a method frequently employed by warehousemen. It is interesting to note, in that regard, that while the Uniform Warehouse Receipts Act<sup>13</sup> prohibits a warehouseman from inserting a clause in his receipt tending to impair his obligation to exercise reasonable care, an indication of the legislatively-expressed public

<sup>10</sup> 90 Ark. 256 at 259, 119 S. W. 249 at 250.

<sup>11</sup> *Noyes v. Hines*, 220 Ill. App. 409 (1920); *Jones v. Great Northern Ry. Co.*, 68 Mont. 231, 217 P. 673, 37 A. L. R. 754 (1923); *Terry v. Southern Ry. Co.*, 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295 (1908).

<sup>12</sup> The court concerned with the case of *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786, 5 A. L. R. 979 (1916), pointed to a distinction between provisions intended to limit liability to a fixed amount and those designed to limit liability to the declared valuation of the bailed property. Compare that case, however, with the holdings in *Brown v. Hines*, 213 Mo. App. 298, 249 S. W. 683 (1923), and *Aetna Casualty & Surety Co. v. Higbee Co.*, 80 Ohio App. 437, 76 N. E. (2d) 404, 174 A. L. R. 1429 (1947).

<sup>13</sup> *Unif. Laws Anno.*, Vol. 3, p. 13, § 3(b).

policy specifically applicable to warehousemen, some courts, even in those jurisdictions which have adopted the uniform act, have construed the provision as not being sufficient to prohibit the so-called "declared valuation" agreements.<sup>14</sup>

Actually, the true problem is not merely whether or not a bailee for hire may limit his liability but when and to what extent he may do so. General expressions to the effect that exoneration agreements are contrary to public policy should not be relied upon too wholeheartedly because courts expressing the thought more likely mean that, under the particular circumstances involved in the case being considered, it would be contrary to public policy to allow the particular bailee to absolve himself from liability for his negligence. This fact is made the more apparent if the comparison is not attempted between the decisions found in a series of states but is confined to holdings of different courts in any one state.<sup>15</sup> While the basis for reconciling these decisions has not yet been reduced to a formula susceptible of universal application, several explanations have been suggested.

One factor appearing to possess a placatory effect on the judicial hostility toward exoneration agreements exists where the amount of the compensation paid the bailee is such that it would not justify the cost involved in taking those precautionary measures which would normally be necessary to insulate him from a charge of negligence. The extreme to which a court may be moved by the presence of such an argument is well illustrated by the case of *Burrill v. The Dollar Savings Bank*,<sup>16</sup> although the case actually involved not a bailment but the validity of a by-law of a bank designed to limit its liability to its depositors. The court there, accepting the provision to be valid, indicated its concern over situations where a good deal of effort would be required to prevent loss in return for only a modest compensation. It said that savings banks were really "charities for the poor. With many thousands of depositors they can only save themselves from imposition and loss by rules strictly enforced. The rule under which the defendants claim protection is a very reasonable one, and necessary for their safety."<sup>17</sup> Even stronger intimation of the weight which the element of compensation bears in determining the validity of exoneration agreements is to be found in those cases which recognize the

<sup>14</sup> *George v. Bekins Van & Storage Co.*, 33 Cal. (2d) 834, 205 P. (2d) 1037 (1949); *French v. Bekins Moving & Storage Co.*, 118 Colo. 424, 195 P. (2d) 968 (1948). See also Williston, *Contracts*, Vol. 4, § 1046.

<sup>15</sup> Compare, for example, *Werner v. Knoll*, 89 Cal. App. (2d) 474, 201 P. (2d) 45 (1948), with *England v. Lyon Fireproof Storage Co.*, 94 Cal. App. 562, 271 P. 532 (1928).

<sup>16</sup> 92 Pa. 134, 37 Am. Rep. 669 (1879).

<sup>17</sup> 92 Pa. 134 at 138, 37 Am. Rep. 669 at 670.

ability of a bailee for hire to limit his liability for his negligence provided the bailor has an option to secure full liability upon payment of an additional reasonable charge. At least one court has upheld such an agreement where the bailee was a common carrier, hence would normally be subject to the duty to exercise the highest degree of care.<sup>18</sup>

A more recent proposal suggests that courts should give consideration to the comparative bargaining power of the parties.<sup>19</sup> Where the bailee, for example, occupies a superior position by virtue of a monopoly over facilities for affording the type of service the bailor needs, or at least where the bailor may not readily resort to someone else for that service, or where the bailor is not in a position to object to the provisions of a bailment agreement prepared by the bailee, courts will be prone to announce the rule that exculpatory provisions contained in an agreement formed under such circumstances are contrary to public policy.<sup>20</sup> A similar result is likely to be reached where the bailee is engaged in a course of general dealing with the public indiscriminately, somewhat in the fashion which would be true of railroads and other utilities, so as to affect the business with a public, as contrasted to an essentially private, interest.<sup>21</sup> Cases involving bailees engaged in operating parking lots<sup>22</sup> or garages<sup>23</sup> bear witness to a hesitancy on the part of courts to enforce exculpatory provisions in their agreements, which tendency disappears when the parties are on an equal footing at the moment of bargaining.<sup>24</sup>

Although the court in the instant case recognized the importance of weighing the comparative bargaining power of the parties, it was con-

<sup>18</sup> *Franklin v. Southern Pac. Co.*, 203 Cal. 680, 265 P. 936 (1928).

<sup>19</sup> The suggestion appears in a note in 37 Col. L. Rev. 248 and in an annotation in 175 A. L. R. 16.

<sup>20</sup> *Fairfax Gas & Supply Co. v. Hadary*, 151 F. (2d) 939 (1945); *Bennett v. American Nat. Bank*, 130 Okla. 23, 264 P. 912 (1928); *Sporsem v. First Nat. Bank*, 133 Wash. 199, 233 P. 641, 40 A. L. R. 854 (1925).

<sup>21</sup> *Denver Union Terminal Ry. Co. v. Cullinan*, 72 Colo. 248, 210 P. 602, 27 A. L. R. 754 (1922). In Restatement, Contracts, Vol. 2, § 575(b), the statement is made that a bargain for exemption from liability for negligence is illegal if "... one of the parties is charged with a public service, and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or been promised compensation."

<sup>22</sup> *Malone v. Santora*, 135 Conn. 294, 64 A. (2d) 51 (1949); *Wendt v. Sley System Garages*, 124 Pa. Super. 224, 188 A. 624 (1936); *Baione v. Heavey*, 103 Pa. Super. 529, 158 A. 181 (1932).

<sup>23</sup> *Grove v. Borchers*, — Ohio App. —, 80 N. E. (2d) 208 (1948); *Simms v. Sullivan*, 100 Ore. 487, 19 P. 240, 15 A. L. R. 678 (1921); *Pilson v. Tip-Top Auto Co.*, 67 Ore. 528, 136 P. 642 (1913).

<sup>24</sup> *Charles Lachman Co. v. Hercules Powder Co.*, 79 F. Supp. 206 (1948); *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 41 P. 783, 29 L. R. A. 751 (1895); *Evans & Pennington v. Nail*, 1 Ga. App. 42, 57 S. E. 1020 (1907); *Chekley v. Illinois Central R. Co.*, 171 Ill. App. 203 (1912); *Smith v. Library Board*, 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280 (1894); *Sanchez v. Blumberg*, 176 S. W. 904 (Tex. Civ. App., 1915).

fronted by an additional consideration. Admittedly, the bank was conducting a business vitally touching the public interest and was in a position to dictate the terms upon which it would accept deposits, terms which the depositor was hardly in a position to dispute. It was a fact, however, that it would be unlikely that a representative of the bank would be present when night deposits were being made so that the only person apt to have actual knowledge of the fact of the deposit would be the depositor himself. As a result, the bank would be at the mercy of a dishonest depositor for it would be without the means to prove that an alleged deposit had not, in fact, been made.<sup>25</sup> This aspect of the case, foreign to the ordinary bailment arrangement, called for special dispensation under which the bank might protect itself by stipulating for a complete exoneration until after the night vault had been opened, the contents examined, and the same accepted for credit to the customer's account. Thereafter, of course, the relationship would be one of debtor and creditor rather than bailor and bailee. To refuse complete exoneration and to limit the contract to one fixing a maximum liability, as was urged by the dissenting judge, would not resolve the bank's predicament; it would still be defenseless against dishonest claims to the extent to which it would be contractually liable. On this ground, then, the result reached in the instant case appears to be entirely reasonable.

It would seem, however, that caution should be exercised in recognizing the validity of exoneration agreements in all except such special cases. As one writer puts it, the effect of "letting the bars of public policy down and freedom of contract in, where the policy has been tried, has not proven an unquestioned and indisputable success."<sup>26</sup> To allow a reaction against the inequity of holding all exoneration agreements to be invalid to become a pendulum swinging too far in the other extreme would merely result in the substitution of injustice to the bailor for that which previously had been endured by the bailee.

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<sup>25</sup> The banking practice appeared to be one under which the night depository was opened only by joint action of two bank employees, one possessing a key and the other informed as to the vault combination, who then tallied the padlocked numbered sacks which contained the deposits made by the customers, which sacks were thereafter placed in the cashier's cage to await call by the customer who would, on arrival, open the sack, remove and bank the contents. Assuming such practice to have been followed at all times, and assuming the honesty of the bank employees, there would seem to be little likelihood that the customer would be placed at the mercy of the bank because he was unable to receive an immediate receipt for, or a record of, his deposit. He could, as in the instant case, use the services of an eye-witness if he needed corroboration evidence.

<sup>26</sup> Willis, "The Right of Bailees to Contract Against Liability for Negligence," 20 *Harv. L. Rev.* 297 (1907), at p. 312.

CORPORATIONS—CAPITAL, STOCK, AND DIVIDENDS—WHETHER PROVISIONS OF UNIFORM STOCK TRANSFER ACT MAKE DELIVERY NON-ESSENTIAL TO A VALID GIFT OF SHARE OF CORPORATE STOCK—The United States Court of Appeals for the Seventh Circuit, in the recent case of *Nagano v. McGrath, Attorney General*,<sup>1</sup> decided for the first time the effect to be given to the provisions of the Uniform Stock Transfer Act<sup>2</sup> relating to delivery in connection with the transfer of title of shares of stock. The plaintiff, a native-born citizen of Japan, entered the United States as a permanent resident and engaged in the manufacture of oriental food products.<sup>3</sup> Later, the plaintiff transferred his business to a corporation, causing nearly all of the shares of its stock to be issued in his own name or in the name of his wife.<sup>4</sup> When the corporation, some years later, declared a stock dividend, the plaintiff, who dominated the enterprise, caused a single certificate for the additional shares to be issued in his wife's name, including therein his portion of the stock dividend. This supplemental certificate was never actually delivered to the wife but was kept by the plaintiff. For that matter, he never informed his wife of the action which had been taken. Following the outbreak of war with Japan, and before plaintiff's wife had returned to this country, the Alien Property Custodian seized all of the shares of stock standing in the wife's name under the authority of the Trading with the Enemy Act.<sup>5</sup> Plaintiff thereafter sued to recover the additional shares, claiming title on the ground that he had never made a valid gift of his portion of the stock dividend and asserting to be a bailee for his wife's original stock. The plaintiff appealed from an order dismissing the complaint,<sup>6</sup> which order had been entered by the District

<sup>1</sup> 187 F. (2d) 753 (1951), reversing 85 F. Supp. 368 (1949).

<sup>2</sup> 6 Unif. Laws Anno., p. 1 et seq. See also Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 416 et seq.

<sup>3</sup> Subsequent thereto, on a visit to Japan, the plaintiff married a native citizen of that country. The wife remained in Japan until the birth of a daughter, then came to the United States as a permanent resident. The passage of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. A. § 145 et seq., made it impossible for the daughter, as well as a second daughter born in Japan while the parents were there on a visit, not previously admitted to the United States, to join her parents in this country. The wife, therefore, remained in Japan with the intention of returning to this country when the daughters had grown up and had married.

<sup>4</sup> 187 F. (2d) 753 at 755. It was admitted that the original shares of stock issued in the wife's name constituted a valid gift to her by the plaintiff.

<sup>5</sup> 50 U. S. C. A., App. § 9(a), as amended December 18, 1941.

<sup>6</sup> The appeal in the instant case was limited to the question of plaintiff's right to the shares which he claimed as his own property. His right to the possession of the balance of the stock as bailee for his wife, dependent on her right as owner, was made the subject of a separate appeal: *Nagano v. McGrath*, 187 F. (2d) 759 (1951).

Court on the basis of the prior Illinois decision in *Chicago Title & Trust Company v. Ward*,<sup>7</sup> a case which held that a transfer of shares on the books of the corporation operated to pass legal title to the person named in the stock certificate. The Court of Appeals, however, reversed the decision on the ground that the Uniform Stock Transfer Act<sup>8</sup> had effectively changed prior case law in Illinois and required delivery as well as, and in addition to, endorsement, assignment or transfer on the books of the corporation in order to pass a complete title to the stock.

To reach this conclusion, the court found it necessary to construe the applicable section pertaining to the delivery<sup>9</sup> together with another section dealing with the effect of an attempt to transfer title without delivery of the certificate.<sup>10</sup> The court stated: "To say that a transfer on the books of a corporation constitutes a delivery within the contemplation of the Act would be to render meaningless that statutory requirement that there be a delivery even in the case where the corporation has expressly provided that its shares are transferable on its books and by no other method."<sup>11</sup> The decision would seem to conform to the fundamental purpose of the Uniform Stock Transfer Act, as that purpose is disclosed in the Commissioners' note,<sup>12</sup> which purpose seems to be to make the stock certificate representative of the shares to the fullest extent possible. All other deci-

<sup>7</sup> 332 Ill. 126, 163 N. E. 319 (1928). Although the case was decided after Illinois had adopted the uniform statute, the transfer took place long prior to its passage. The decision makes no reference to the statute nor does it purport to be grounded thereon.

<sup>8</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 416, provides: "Title to a certificate and to the shares represented thereby can be transferred only: (a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or (b) By delivery of the certificate [sic] and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person." There is a proviso to the effect that the statute shall be applicable even though the charter or articles of incorporation, or the certificate itself, shall provide that the shares shall be transferable only on the books of the corporation.

<sup>9</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 416.

<sup>10</sup> *Ibid.*, § 425, provides: "An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts."

<sup>11</sup> 187 F. (2d) 753 at 757.

<sup>12</sup> At 6 Unif. Laws Anno., p. 2, appears the statement: "The provisions of this section are in accordance with the existing law, except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books becomes thus like the record of a deed of real estate under a registry system."



sions directly in point have reached the same conclusion,<sup>13</sup> and textual writers also agree therewith.<sup>14</sup> Other provisions of the Act would also indicate a legislative intent to make the requirement of delivery into a mandatory one, for Section 10 provides that an attempted transfer of shares without delivery of the certificate has no more effect than that of a promise to transfer,<sup>15</sup> while Section 13 provides that no attachment or levy upon shares of stock shall be valid until the certificate has been actually seized by the officer making the attachment or levy.<sup>16</sup>

Although there have been a few decisions which might seem to have reached a contrary conclusion, all such cases can be differentiated on the basis of the factual situation involved. At common law, the voluntary transfer of possession from one person to another constituted a delivery.<sup>17</sup> The Uniform Stock Transfer Act has not changed this rule, so delivery of the stock certificate to a third person may be sufficient. In the case of *Snidow v. National Bank of Narrows*,<sup>18</sup> for example, the donor wrote a letter addressed to the donee, stating his intention to make a gift, and put the letter and the certificates in a safety deposit vault, giving the key to the bank cashier with instructions to deliver the same to the donee. The court held these acts amounted to a valid delivery. A subsequent decision in the same jurisdiction reached the same conclusion where the donor had requested a friend, already in possession of the stock certificate, to transfer the same to the donee.<sup>19</sup> The court held the gift was consummated on the delivery of written instructions to make the transfer. Written instructions to a bailee, in possession of the stock certificates, to hold them for the donee have been held to constitute a gift provided the bailee, expressly or impliedly, assents to the instruction.<sup>20</sup> Delivery to the donor's agent, however, will be ineffectual<sup>21</sup> for the agent is no more than the *alter ego*

<sup>13</sup> *In re Broomhall, Killough & Co., Inc.*, 47 F. (2d) 948 (1930); *Daws v. Drusilla Home*, 118 Ind. App. 639, 79 N. E. (2d) 420 (1948); *Lockhart v. Dickey*, 161 La. 282, 108 So. 483 (1926); *Parker v. Colonial Building-Loan Ass'n*, 111 N. J. Eq. 49, 161 A. 353, 99 A. L. R. 1077 (1932); *Besson v. Stevvens*, 94 N. J. Eq. 549, 120 A. 640 (1923); *Figuers v. Sherrell*, 181 Tenn. 87, 178 S. W. (2d) 629 (1944).

<sup>14</sup> *Christy and McLean, The Transfer of Stock* (Baker, Voorhis & Co., New York, 1940); *Modesitt, "Application of the Uniform Stock Transfer Act to Gifts of Stock,"* 20 Rocky Mount. L. Rev. 67 (1947); *Mechem, "Gifts of Corporation Shares,"* 20 Ill. L. Rev. 9 (1925); 38 C. J. S., Gifts, § 46.

<sup>15</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 425.

<sup>16</sup> *Ibid.*, § 428.

<sup>17</sup> 38 C. J. S., Gifts, § 46.

<sup>18</sup> 178 Va. 239, 16 S. E. (2d) 385 (1941), noted in 28 Va. L. Rev. 418.

<sup>19</sup> *Payne v. Tobacco Trading Corp.*, 179 Va. 156, 18 S. E. (2d) 281 (1942).

<sup>20</sup> *Richardson v. Commissioner*, 126 F. (2d) 562 (1942).

<sup>21</sup> *Cross v. Cross*, 20 N. J. Misc. 359, 27 A. (2d) 877 (1942).

of the principal and possession by the agent is deemed to be possession on the part of the principal. Just as at common law, a symbolic delivery, such as the delivery of a letter<sup>22</sup> or a key to a safety deposit vault containing the stock,<sup>23</sup> may be sufficient.

The problem of delivery would appear to be a somewhat complicated one where the donor wishes to make the donee a joint owner of the stock, but courts quite generally have held, in such situations, that delivery to one of the joint owners is sufficient.<sup>24</sup> This view is in accordance with a general rule to the effect that, where cotenants own personalty not easily divisible, the possession of one cotenant is, in contemplation of law, the possession of the other.<sup>25</sup> It is also possible for a donor to constitute himself trustee for the benefit of the donee so as to prevent the rise of any question as to delivery.<sup>26</sup> If the donor should appoint a third person as trustee, however, a failure to deliver the stock certificate will cause the trust to fail for want of a trust *res* to support it<sup>27</sup> since, in the absence of consideration, the implied promise to convey legal title could not be enforced.

An examination of all of the decided cases pertaining to delivery of a gift of stock wherein the provisions of the Uniform Stock Transfer Act were applicable discloses that delivery has been regarded as a mandatory requirement. Cases seemingly in contradiction involve nothing more than variations in the manner of delivery which would not have been exceptional under the general rule made applicable to gifts at common law. The instant case, therefore, merely reiterates the common law rule and demonstrates that shares of stock, for this purpose, by statutory mandate, are to be treated on the same basis as other common-law choses in action. It is noteworthy, however, for having served to abrogate a common law rule to the effect that a transfer on the books of the corporation would be sufficient to vest legal title in the donee.

H. E. GORMAN

<sup>22</sup> *Hillary Holding Corp. v. Brooklyn Jockey Club*, 88 N. Y. S. (2d) 198 (1949), decision pursuant to opinion in 273 App. Div. 538, 78 N. Y. S. (2d) 151 (1948).

<sup>23</sup> *In Succession of McGuire*, 151 La. 514, 92 So. 40 (1922).

<sup>24</sup> *Young v. Cockman*, 182 Md. 246, 34 A. (2d) 428 (1943); *Imparato v. Luscardi*, 123 N. J. Eq. 298, 197 A. 379 (1938); *East Rutherford Sav., Loan & Build. Ass'n v. McKenzie*, 87 N. J. Eq. 375, 100 A. 931 (1917); *Gugle v. Gugle*, 83 Ohio App. 85, 78 N. E. (2d) 585 (1948); *In re Connell's Estate*, 282 Pa. 555, 128 A. 503 (1925).

<sup>25</sup> 14 Am. Jur., *Cotenancy*, § 23.

<sup>26</sup> *Hudgens v. Tillman*, 227 Ala. 672, 151 So. 863 (1934); *Fall River National Bank v. Estes*, 279 Mass. 380, 181 N. E. 242 (1932).

<sup>27</sup> *Johnson v. Johnson*, 300 Mass. 24, 13 N. E. (2d) 788 (1938).

CORPORATIONS—OFFICERS AND AGENTS—WHETHER OR NOT A DIRECTOR MAY SECURE REIMBURSEMENT FROM HIS CORPORATION FOR HIS ATTORNEYS' FEES WHEN HE HAS BEEN SUCCESSFUL IN THE DEFENSE OF A STOCKHOLDER'S DERIVATIVE ACTION—A problem which heretofore has received little judicial attention but which is, nevertheless, one of importance, was recently passed on by the Supreme Court of Minnesota in the case of *In re E. C. Warner Company*.<sup>1</sup> The problem concerned the right of a director to be reimbursed<sup>2</sup> by his corporation for his attorneys' fees after he had been judicially vindicated in a suit brought against him for an alleged dereliction of duty. The facts of the case disclosed that shortly after a derivative action had been concluded in favor of the director, the corporation entered into voluntary dissolution and a receiver was appointed. Pursuant to an order directing creditors to present claims, the attorneys who had represented the director in the derivative action advanced a demand for the services they had rendered in his behalf.<sup>3</sup> The receiver, in doubt as to the propriety of the claim, sought a determination as to its validity and the claim was allowed by the trial court. That holding was affirmed on an appeal taken by certain interested stockholders. In arriving at that conclusion, the higher court reasoned that the director not only had a right to resist the suit but was also under a duty to do so since, if he allowed the action to go unchallenged, it would result in the removal from corporate guidance of one to whom that guidance had been committed by the stockholders. The court also indicated that if a contrary rule prevailed it would succeed in deterring men of ability and substance from assuming the responsibilities of a director.

The rule has become well established that when a stockholder is successful in the prosecution of a derivative action he is entitled to reimbursement for counsel fees expended toward that end,<sup>4</sup> particularly so if the action has conferred a tangible benefit on the corporation by creating, increasing or protecting a corporate fund.<sup>5</sup> The corporation, although

<sup>1</sup> — Minn. —, 45 N. W. (2d) 388 (1950).

<sup>2</sup> Reimbursement, as used herein, will be considered synonymous with exoneration since it makes no difference whether the corporation pays the fees directly to counsel or merely reimburses the director for sums already spent.

<sup>3</sup> The opinion does not reveal the basis for the right of the attorneys to present the claim in their own names. It seems clear that, without an assignment or some other contractual right, there would be a procedural defect since proceedings to recover for attorneys' fees are typically brought by the litigant in his own name.

<sup>4</sup> *Winkelman v. General Motors Corp.*, 48 F. Supp. 504 (1942); *Auer v. Wm. Meyer Co.*, 322 Ill. App. 244, 54 N. E. (2d) 394 (1944). See also Hornstein, "The Counsel Fee in Stockholder's Derivative Suits," 39 Col. L. Rev. 784 (1939), and annotation in 152 A. L. R. 909 at 914.

<sup>5</sup> *Bingham v. Ditzler*, 320 Ill. App. 88, 49 N. E. (2d) 812 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 159. It was there suggested that it might be desirable to have a statute permitting the corporation to obtain reimbursement from the director.

nominally a defendant in such suit, is in reality the successful party and equitably should bear the cost of litigation which has resulted in its advantage. With such a rule acting as a constant stimulus to disgruntled stockholders to bring derivative actions to the vexation of directors, it seems anomalous that only four courts should have had occasion to pass upon the problem presented by the instant case.<sup>6</sup>

In the first of these decisions, that by the Supreme Court of Wisconsin in the case of *Figge v. Bergenthal*,<sup>7</sup> the court, allowing reimbursement to the directors, simply said: "Clearly, if no case is made against defendants it is not improper or unjust that the corporation should pay for the defense of the action."<sup>8</sup> Twenty-five years later, the Ohio court concerned in the case of *Griesse v. Lang*,<sup>9</sup> incorrectly deeming the *Figge* case to have been overruled by a subsequent Wisconsin case,<sup>10</sup> decided that reimbursement should be denied to the judicially vindicated directors. In reaching that result, the court relied on the familiar general rule that corporation funds may only be expended or used to the advantage of the corporation or for purposes stated in the charter unless assent is given by all the stockholders.<sup>11</sup> It, therefore, took a strict approach to the problem, making it incumbent upon the directors to show that their defense of the action had produced a benefit for the corporation, a point exceedingly difficult to establish.<sup>12</sup> It has remained for two subsequent cases, however, to crystal-

<sup>6</sup> A note in 25 Corn. L. Q. 437 suggests that the reasons for the paucity of cases on the question are: (1) that usually no claim for reimbursement is made, and (2) that appropriation for the expense incurred is made by the corporation without objection from the stockholders.

<sup>7</sup> 130 Wis. 594, 109 N. W. 581 (1906). It should be noted that the case was not strictly a derivative suit but was a remedial action for fraud and mismanagement based on a statute. That factor, however, should not affect the validity of the case for the present purpose.

<sup>8</sup> 130 Wis. 594 at 625, 109 N. W. 581 at 592. A headnote to *Stendall v. Longshoreman's P. U. B. Ass'n*, 116 La. 974, 41 So. 228 (1906), states: "The expenses of a suit against the officers of a corporation to oust them from office are at the charge of the corporation, and not of the officers." While the statement would appear to support the language of the Wisconsin court, it is valueless for present purposes since there is no reference to the point in the opinion itself.

<sup>9</sup> 37 Ohio App. 553, 175 N. E. 222 (1931), noted in 27 Ky. L. J. 102, 16 Minn. L. Rev. 102.

<sup>10</sup> *Jesse v. Four Wheel Drive Auto Co.*, 177 Wis. 627, 189 N. W. 276 (1922). That case and *Figge v. Bergenthal*, 130 Wis. 594, 109 N. W. 581 (1906), are clearly distinguishable on their facts.

<sup>11</sup> *Joy v. Jackson & Michigan Plank Road Co.*, 11 Mich. 155 (1863); *Jesse v. Four Wheel Drive Auto Co.*, 177 Wis. 627, 189 N. W. 277 (1922).

<sup>12</sup> Benefit to the corporation flowing from the successful defense of a derivative action by the director would be indirect at best. A note in 27 Ky. L. J. 102 suggests that a benefit might accrue to the corporation in that the director would be apt to extend himself to the best of his ability to serve the corporation after the entity has accorded him just treatment by the payment of his legal expenses. Something more tangible would seem to be necessary. In *Godley v. Crandall & Godley Co.*, 181 App. Div. 75, 168 N. Y. S. 251 (1917), affirmed without opinion in 227 N. Y. 656, 126 N. E. 908 (1920), a suit to appoint a receiver for the corporation

lize the divergence of legal opinion which encompasses the question here discussed.

Perhaps the strongest expression of judicial authority supporting the negative side of the question is the New York case of *New York Dock Company, Inc. v. McCollom*,<sup>13</sup> wherein the corporation sought a declaratory judgment to the effect that it was not legally obligated to pay its directors for the expense which they had incurred in the successful defense of a derivative action.<sup>14</sup> The court, deciding for the corporation, reasoned that in the first place there was no implied contract which would entitle the directors to recovery. In that connection, cases involving other fiduciaries were rejected as being inapplicable to the situation of a director who was said to be *sui generis*. Secondly, the court held there was no broad equitable obligation to repay the directors, relying on the authority of the Griesse case as well as on the proposition that liability to stockholders' suits was a risk attendant upon the acceptance of a directorship.<sup>15</sup> Lastly, it dismissed the social argument, one to the effect that unless a right of reimbursement was established men of ability would hesitate to accept directorships, on the ground that the settled law of the state made it impossible to lend it any weight.

On the other hand, the New Jersey case of *Solimine v. Hollander*<sup>16</sup> evolved a contrary result, permitting the judicially vindicated directors to obtain reimbursement for their attorneys' fees. To achieve that result, the court found it necessary to rationalize that derivative suits were not a hazard assumed by directors but rather that it was the duty of directors to defend against unjust charges in order that corporate guidance should not be wrested from those in whom the stockholders had placed their trust. For support, the court relied on a trust case which had decided that the trust estate was liable for counsel fees incurred by a trustee who had been successful in defending an action brought to remove him as trustee for alleged mismanagement.<sup>17</sup> That principle was held applicable to a director for, while the court was careful not to denominate him a trustee,

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was successfully resisted by the director. See also *Esposito v. Riverside Sand & Gravel Co.*, 287 Mass. 185, 191 N. E. 363 (1934); *Albrecht, Maguire & Co. v. General Plastics*, 256 App. Div. 134, 9 N. Y. S. (2d) 415 (1939), affirmed without opinion in 280 N. Y. 840, 21 N. E. (2d) 887 (1939); and annotation in 152 A. L. R. 909 at p. 922.

<sup>13</sup> 173 Misc. 106, 16 N. Y. S. (2d) 844 (1939), noted in 25 Corn. L. Q. 437.

<sup>14</sup> It is to be noted that the presentation of the question in this form framed the issue narrowly and made the director's task more difficult. See Washington, "Litigation Expenses of Corporate Directors in Stockholders' Suits," 40 Col. L. Rev. 431 (1940), particularly pp. 442-3.

<sup>15</sup> The court intimated that if the defense had been beneficial to the corporation indemnification would have been appropriate.

<sup>16</sup> 129 N. J. Eq. 264, 19 A. (2d) 344 (1941), noted in 26 Minn. L. Rev. 119.

<sup>17</sup> *Jessup v. Smith*, 223 N. Y. 203, 119 N. E. 403 (1918).

it recognized a substantial similarity in the fiduciary attributes of each. Although the court did not rest its decision on the "benefit" theory, it considered that the successful defense of the derivative action by the director had produced a benefit to the corporation by demonstrating the honest purpose of the corporate management to the investing public. Further reason for the holding was said to be found in the fact that it would serve to induce men of high business acumen to accept directorships.<sup>18</sup>

The basic difference between the McCollom and the Solimine cases turns on the unwillingness of the former to accord to directors the same fiduciary privileges as are applicable to trustees, executors, and receivers. The right of each of these fiduciaries to reimbursement for counsel fees expended in the successful resistance of suits brought to remove them for alleged abuse of trust is well established.<sup>19</sup> It would seem as if the underlying principle which supports a right of repayment for these other fiduciaries should be made applicable to directors even though, in other respects, they are *sui generis*.<sup>20</sup> Courts willing to look at the problem in this light would find adequate basis from which to overcome the contention that the defense of a derivative action is a risk attendant upon the acceptance of a directorship.

Another difference concerns the argument that if a rule were established which would deny reimbursement there would be few men of high business caliber who would be willing to accept directorships. The policy underlying this argument was curtly dismissed in the McCollom case, but was strongly relied on in both the Solimine and the instant cases. Statutory restrictions developed in recent years, together with the imposition of higher standards, have made the director's position one extremely vulnerable to suit although he usually continues to receive no more than nominal compensation for the assumption of these added risks.<sup>21</sup> The equities, therefore,

<sup>18</sup> An indirect product of this argument would be that directors of limited means would be able to retain more competent, and presumably more costly, counsel than might otherwise be the case if it was known that the financially abler corporation would stand the expense of a successful defense.

<sup>19</sup> As to trustees, see *Jessup v. Smith*, 223 N. Y. 203, 119 N. E. 403 (1918). The rights of executors are considered in *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250 (1854); *In re Levinson's Estate*, 108 Cal. 450, 41 P. 483 (1895); *Armstrong v. Boyd*, 140 Ga. 710, 79 S. E. 780 (1913); *Jacobs v. Jacobs*, 99 Mo. 427, 12 S. W. 457 (1889). See also *Woerner, The American Law of Administration* (Little, Brown & Co., New York, 1899), 2d Ed., §§ 515-7. As to receivers, see *Missouri & K. I. Ry. Co. v. Edson*, 224 F. 79 (1915). Public officials have not been accorded this treatment but the holding may be reconciled on the ground that public funds are concerned: *Chapman v. City of New York*, 168 N. Y. 80, 61 N. E. 108 (1901).

<sup>20</sup> *Stevens, Handbook on the Law of Private Corporations* (West Publishing Co., St. Paul, 1949), 2d Ed., p. 647, and cases there cited, provides a discussion of the legal characteristics of a director.

<sup>21</sup> *Washington, "Litigation Expenses of Corporate Directors in Stockholders' Suits,"* 40 Col. L. Rev. 431 (1940), at p. 432.

support a claim for reimbursement but subject to two important limitations. One is that there should be no indemnification unless the director has been vindicated on the merits of the derivative action.<sup>22</sup> The other is that none of the corporate funds should be expended toward the personal defense of the director during the course of the trial.<sup>23</sup> Without these limitations, the ability of stockholders to protect themselves from the acts of dishonest directors would be seriously impaired.

The force of the New York decision in the McCollom case may also be said to be shaken by legislative action which has been taken in that state, action designed not only to shut off the frequency of "strike" suits by minority stockholders but also to insure indemnification for the vindicated and diligent director.<sup>24</sup> If there should be fear that other courts, when first faced with the problem, would be inclined to follow a traditional, rather than a liberal approach, the answer would seem to lie in the enactment elsewhere of similar legislation.

A. S. GREENE

GRAND JURY—ATTENDANCE AND EXAMINATION OF WITNESSES—WHETHER OR NOT A REFUSAL TO ANSWER SEVERAL QUESTIONS CONCERNING THE SAME SUBJECT MATTER WARRANTS PUNISHMENT AS FOR SEVERAL CONTEMPTS—Frequent reiteration, by witnesses who have recently appeared before various congressional committees, of the stock answer "I refuse to answer on constitutional grounds," has tended to make the remark somewhat of a colloquialism but it has also produced a number of legal problems.<sup>1</sup> One such problem arose in a New York habeas corpus proceeding entitled *People ex rel. Amarante v. McDonnell*.<sup>2</sup> The relator there, on interrogation before a grand jury, had been asked seven questions, each of which was designed to ascertain whether or not he owned or managed a store wherein forms of gambling had been found to flourish. For refusal to answer any one of the questions, the relator was taken before an appropriate court and was sentenced to the maximum fine and term of imprisonment warranted for seven criminal contempts. On petition for habeas corpus chal-

<sup>22</sup> *Wood v. Noma Electric Corp.*, N. Y. L. J. Oct. 10, 1936, p. 1121, col. 7, and Washington, "Litigation Expenses of Corporate Directors in Stockholders' Suits," 40 Col. L. Rev. 431 (1940), at p. 540. It has been held that not only must the defense be as to the merits of the claim but it must also be successful: *Witherspoon v. Hornbeing*, 70 Colo. 1, 196 P. 865 (1921); *Monahan v. Kenny*, 248 App. Div. 159, 288 N. Y. S. 323 (1936).

<sup>23</sup> *Solimine v. Hollander*, 129 N. J. Eq. 264, 19 A. (2d) 344 (1941).

<sup>24</sup> Cahill's Cons. Laws N. Y., Dec. Supp. 1938-48, Vol. 1, Gen. Corporation Law, Art. 6A, § 63.

<sup>1</sup> A general symposium on the subject of congressional investigations appears in 18 U. of Chi. L. Rev. 421-661 (1951).

<sup>2</sup> — Misc. —, 100 N. Y. S. (2d) 463 (1950).

lenging the validity of that judgment, it was held that the relator could be punished for but one criminal contempt as the questions concerned the same subject matter and were designed to elicit but one answer.

Before considering the problem presented, it might be well to eliminate certain other aspects of the general subject which might produce confusion. If a man is to be punished for one contempt while refusing to answer questions concerning the same subject matter, it might be thought that, being punished once, he could not again be punished for again refusing to answer the same questions. Such, however, is not the law for the rule as to double jeopardy is inapplicable because each separate occasion is treated as a separate contumacious act.<sup>3</sup> Similarly, a single trial for several separate and distinct contemptuous acts<sup>4</sup> could well result in several individual sentences. Acts which have been treated as amounting to separate acts of contempt, however, have usually been characterized by a separation in point of time,<sup>5</sup> have constituted successive violations of an injunction,<sup>6</sup> or have represented distinct affronts to the character and dignity of the judge and the court.<sup>7</sup>

With this much distinction, the problem herein involved can be placed in focus. While there is a paucity of cases on the subject, the outcome and language of those which have been discovered appears to be identical in nature. In four cases<sup>8</sup> beside the principal case, it was found to be proper to impose punishment for but one contempt for, in each case, the questions asked were devised so as to elicit the same general information. Final evidence of homogeneity in the cases in this group is to be found in the likeness of the phrases which were used to characterize the similarity of the content of the questions. The principal case and one other<sup>9</sup> speak of

<sup>3</sup> *State v. Kasherman*, 177 Minn. 200, 224 N. W. 838 (1929).

<sup>4</sup> *Ex parte Genecov*, 143 Tex. 476, 186 S. W. (2d) 225, 160 A. L. R. 1099 (1945).

<sup>5</sup> *Solano Aquatic Club v. Superior Court of Solano County*, 165 Cal. 278, 131 P. 874 (1913); *In re Clark*, 126 Mo. App. 391, 103 S. W. 1105 (1905).

<sup>6</sup> *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 P. 628 (1884); *People ex rel. Post v. Grant*, 13 N. Y. Civ. Proc. 305 (1888), reversed on other grounds in 50 Hun. 243, 3 N. Y. S. 142 (1888); *Ex parte Genecov*, 143 Tex. 476, 186 S. W. (2d) 225, 160 A. L. R. 1099 (1945).

<sup>7</sup> *Hume v. Superior Court*, 17 Cal. (2d) 506, 110 P. (2d) 669 (1941); *Ex parte Shuler*, 210 Cal. 377, 292 P. 481 (1930); *Lindley v. Superior Court*, 76 Cal. App. 419, 245 P. 212 (1926).

<sup>8</sup> *United States v. Emspak*, 95 F. Supp. 1012 (1951); *United States v. Yukio Abe*, 95 F. Supp. 991 (1950); *Maxwell v. Rives*, 11 Nev. 213 (1876); *Fawick Airflex Co. v. United Electrical, R. & M. Wkrs.*, 87 Ohio App. 371, 92 N. E. (2d) 431 (1950). While the aforementioned cases discuss the problem of single as against multiple punishment, it is to be noted that in *People v. Sheridan*, 349 Ill. 202, 181 N. E. 617 (1932), and in *People v. Finkel*, 157 Misc. 781, 284 N. Y. S. 725 (1935), evasive answers were given to a number of questions but, without comment, the court invoked punishment for but one contempt.

<sup>9</sup> *Fawick Airflex Co. v. United Electrical, R. & M. Wkrs.*, 87 Ohio App. 371 at 388, 92 N. E. (2d) 431 at 436 (1950). The subject matter of the questions asked concerned whether or not the witness was, or ever had been, affiliated with the Communist Party.



the "same subject matter"; another uses the phrase "one subject of inquiry";<sup>10</sup> still another speaks of the questions as all concerning "the same issue";<sup>11</sup> while the remaining case approves the last mentioned phrase.<sup>12</sup>

While the correctness of these decisions is not to be questioned, at least from the point of view of any injustice to the individual, it should be observed that the qualifying words mentioned could lead to a position which might unfairly impinge upon the liberty of the individual. This follows for the result of such language would point to an opposite rule which would, if the interrogator was able to present a line of questioning that covered more than one subject matter, expose the individual to a separate punishment for contempt for every refusal which covered a different issue.<sup>13</sup> To such a rule, some practical objections could be entertained. In the first place, there would be no certainty as to the maximum punishment to which an individual would be subject, for the judge, at the time for determining the extent of the punishment, would have to search the record and make distinctions, difficult to make objectively, as to when one line of questioning had been abandoned and a new line taken up. Secondly, if the punishment is to be invoked because of the objectionable attitude displayed by the individual, what difference should it make whether his refusals pertain to one or to different subject matters? In the end, he has only one and the same contumacious attitude justifying but one punishment for contempt.<sup>14</sup>

There is still another objection to such a rule, but one less likely to arise over an investigation conducted by a court or a grand jury, where specific issues may be the more readily formulated, than is true with respect to inquisitorial proceedings conducted by legislative committees where there is opportunity to embark upon a line of questioning covering

<sup>10</sup> This phrase, as used in *United States v. Yukio Abe*, 95 F. Supp. 991 at 992 (1950), again concerned questions as to membership in the Communist Party. The proceeding was based on 2 U. S. C. A. § 192, each refusal being set out in a separate count. On motion to dismiss, the court held that it was proper to put each refusal in a separate count but, as the refusals concerned one subject of inquiry, proper punishment was said to be limited to that for one contumacious refusal.

<sup>11</sup> *Maxwell v. Rives*, 11 Nev. 213 at 217 (1876). Hawley, C. J., in a concurring opinion, characterized the fact that all the questions were designed to ascertain what the witness had done with certain silver bullion.

<sup>12</sup> In *United States v. Emspak*, 95 F. Supp. 1012 (1951), a proceeding similar to the one cited in footnote 10, the court recognized that inasmuch as all the questions were designed to ascertain whether the witness was a member of the Communist Party they necessarily concerned the same issue.

<sup>13</sup> It would theoretically be possible for an ambitious interrogator, by a suitable variation of his questions, to produce a result under which the contemptuous witness might be imprisoned for the balance of his life, particularly if the sentences were made to run consecutively.

<sup>14</sup> *State ex rel. Parker v. Mouser*, 208 La. 1093, 24 So. (2d) 151 (1945). O'Niell, C. J., wrote a dissenting opinion.

a multitude of subject matters. A basic fear of all forms of inquisitions has produced a pattern of constitutional protection designed to cloak the individual with certain rights which have operated to produce a fence around the scope of these inquisitorial proceedings.<sup>15</sup> The implications suggested by the rule laid down in the instant case might well operate to whittle away at that protection.

With this in mind, it may be noted that three of the recent cases mentioned had to do with the asking of a series of questions designed to elicit the fact as to whether or not the witness was a member of the Communist Party.<sup>16</sup> Apparently, under the impetus of such investigations, sight is being lost of the objectives of a democratic form of government. If the rule laid down in these cases is observed, a position will be attained consistent with a fundamental desire to preserve that carefully guarded balance which, at a minimum, puts the witness on an equal footing with the questioner. If this balance be upset, as the intimations indicate it might be, the result would be to place an additional weapon at the disposition of the inquisitor. That weapon, taking the form of a lever of coercion based on a threat of the possibility of being asked numerous questions covering many issues with a consequence of not one but many punishments for refusal to answer, might well intimidate all but the staunchest of witnesses.<sup>17</sup> Such a result would hardly conform to long recognized and fundamental concepts of government under a free society.

While the correctness of the result of the principal case is not challenged, it would seem that the inherent reasoning thereof is poor. Truer reason for the result would appear to lie in the fact that the refusal to answer one or many, related or unrelated, questions asked at one proceeding should warrant punishment for but a single contempt because of the singleness of the attitude displayed rather than because of any similarity in the line of interrogation.

D. R. HANSON

<sup>15</sup> U. S. Const., Amend. V, states that no person "shall be compelled in any criminal case to be a witness against himself." It reflects the reality of a fear on the part of its framers and supporters against the former inquisitorial nature of British criminal proceedings. The protection thereof, of course, is not limited to judicial matters.

<sup>16</sup> *United States v. Emspak*, 95 F. Supp. 1012 (1951); *United States v. Yukio Abe*, 95 F. Supp. 991 (1950); *Fawick Airflex Co. v. United Electrical, R. & M. Wkrs.*, 87 Ohio App. 371, 92 N. E. (2d) 431 (1950).

<sup>17</sup> While it is admitted that a witness has a right to refuse to answer those questions which might tend to incriminate him, it must be recognized that he may wish to refuse to answer other questions because his answers might do injury to his reputation or to his financial position. If a refusal to answer the significant question is apt to expose him to lines of further questioning as to other matters, he may yield to the pressure so generated to avoid the dilemma of choosing between self-disgrace or self-injury on the one hand and the overly-weighted penalty of punishment for a series of contempts on the other.

WORKMEN'S COMPENSATION—ACTIONS BY THIRD PERSONS AGAINST EMPLOYER—WHETHER EMPLOYER WHOSE INSURANCE CARRIER HAS PAID COMPENSATION CLAIM UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT MAY BE REQUIRED TO MAKE CONTRIBUTION TO OR INDEMNIFY A THIRD PARTY—The case of *Liberty Mutual Insurance Company v. Vallendingham*<sup>1</sup> discloses an interesting interpretation which has been given to Section 905 of the Longshoremen's and Harbor Workers' Compensation Act.<sup>2</sup> It appeared therein that an employee of an employer who was subject to the Act had been injured in the course of his employment and had elected to accept the compensation benefits there provided. Plaintiff, insurance carrier for the employer, by appropriate subrogation proceedings under the Act,<sup>3</sup> brought suit against certain defendants charging that their negligence had contributed to the employee's injury. These defendants thereupon impleaded the employer as a third-party defendant,<sup>4</sup> claiming that the employer's contributory negligence was a proximate concurring cause of the employee's injury and seeking contribution from the employer.<sup>5</sup> The plaintiff moved to dismiss the third-party complaint and that motion was granted on the ground that Section 905 of the Act released the employer from liability to "anyone otherwise entitled to recover damages from such employer" on account of an injury or death, for which reason it was not possible to hold the employer to contribution based on the contention that the employer was a joint tortfeasor. In that fashion, the court guaranteed to the employer the protection which had been sought by transferring the risk to an insurer.

The question raised in the principal case has to do with the right of contribution from an employer who has made provision for the payment of compensation benefits under the Act, but an identical problem could well arise where the third party seeks indemnification from an employer

<sup>1</sup> 94 F. Supp. 17 (1950). The case arose in the District of Columbia which has adopted the Longshoremen's and Harbor Workers' Compensation Act as the general workmen's compensation act for the District: D. C. Code 1940, § 36-501.

<sup>2</sup> 33 U. S. C. A. § 901 et seq. Section 905 provides, in part, that the liability "of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages* from such employer at law or in admiralty on account of such injury or death." Italics added.

<sup>3</sup> Ibid., § 933(b), provides that acceptance of compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against a third person. Section 933(i) directs that if an employer is insured and the insurance carrier has assumed the payment of compensation, the insurance carrier is to be subrogated to all the rights of the employer under this section. See also *The Etna*, 138 F. (2d) 37 (1943).

<sup>4</sup> Third-party practice is authorized by Fed. Rules Civ. Prac., Rule 14.

<sup>5</sup> The District of Columbia, contrary to common law principles, recognizes a right of contribution between joint tortfeasors.

subject to the Act. While many of the reported cases draw no distinction between the two situations, they will be treated separately in this discussion for reasons to be indicated later.

The instant case, adopting a practical view to prevent defeat of the purpose of the statute, states that no right of contribution exists in such cases. But this has not always appeared to be so for the progress of reasoning has been an uphill one largely because of dicta appearing in certain admiralty cases where the question of contribution or indemnity was not squarely before the court.<sup>6</sup> Those cases have tended to indicate, in a general way, that a right to contribution or indemnity from an employer who is subject to the Act exists because admiralty law, unlike common law, recognizes a right of contribution between joint tortfeasors.<sup>7</sup> Such dicta was followed in the case of *The Tampico*,<sup>8</sup> an admiralty case directly in point with the principal one but one which reached an entirely contrary holding. The employer there was impleaded in accordance with certain provisions of admiralty practice<sup>9</sup> and judgment was pronounced against the libellee together with a provision that the libellee might have contribution from the employer for one-half of the amount of the judgment. It was there stated that the admiralty rule of contribution between joint tortfeasors did not rest on subrogation but arose directly from the tort, for which reason the immunity given by the Act to the employer furnished no defense against the libellee's claim to contribution.<sup>10</sup> It should be noted, however, that the decision was based on an admiralty rule and that little thought was there given to the practical aspects of the statute itself. That an employer, bound by the Act to an employer's limited but inevitable liability, should exchange that limited liability for an unconditional and unlimited one is not within reason. Accordingly, remedies against

<sup>6</sup> Cases frequently cited as authority for the proposition that, notwithstanding Section 905 of the Act, an employer may be liable for contribution or indemnity to a third party sued by an employee of the employer are *Rederii v. Jarka Corp.*, 26 F. Supp. 304 (1939), affirmed in 110 F. (2d) 234 (1940); *Calvino v. Pan-Atlantic S. S. Corp.*, 29 F. Supp. 1022 (1939), noted in 168 A. L. R. 612; and *Cataldo v. A/S Glittre*, 41 F. Supp. 555 (1941). These cases contain only dicta on the point.

<sup>7</sup> See *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 220, 27 S. Ct. 246, 51 L. Ed. 450 (1907).

<sup>8</sup> 45 F. Supp. 174 (1942).

<sup>9</sup> 28 U. S. C. A., Adm. Rule 56.

<sup>10</sup> The view so expressed has been followed in *Baccile v. Halcyon Lines*, 89 F. Supp. 765 (1950); *Portal v. United States*, 85 F. Supp. 458 (1949); *The S. S. Samovar*, 72 F. Supp. 574 (1947), citing dicta in the *Rederii* and *Cataldo* cases; and *Christon v. United States*, 8 F. R. D. 327 (1947), which cited *American Stevedores v. Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947). That case was decided on the basis of contractual indemnity. Upon remand, in *Porello v. United States*, 94 F. Supp. 952 (1950), the validity of the contract requiring indemnity from the employer to the United States was upheld.

the employer under circumstances of the type involved in the principal case should be strictly limited.<sup>11</sup>

The practical view suggested finally prevailed in the case of *Johnson v. United States*,<sup>12</sup> also an admiralty case, wherein the exclusiveness of remedy against the employer was first treated with the thought in mind that to hold an employer for contribution would be contrary to the manifest purpose of the Act. The court there indicated that to hold that an employer, bound by a compulsory compensation act, could be sued indirectly, as was there proposed, would be "like opening a hole in a dike,"<sup>13</sup> and would destroy the basic principle of compensation. The doctrine of that case now seems firmly imbedded in the law and the logic thereof would be hard to attack. The Act, by preventing recovery by an employee against his employer on the ground of the employer's negligence, operates to make the statutory obligation of the employer to pay compensation into an exclusive one. If the statute was to be construed to preserve the employer's liability for the payment of a sum measured, in whole or in part, by the damages sustained by the employee, merely because the negligence of a third party concurred, or was claimed to have concurred, with his own in producing the injury, the employer's liability would then be lacking in exclusiveness. For that reason, it was said, in the case of *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corporation*,<sup>14</sup> that it was immaterial whether his liability to a joint tortfeasor stemmed from "a statutory right to contribution or from general principles of the admiralty law."<sup>15</sup> It is clear, then, that where an employer is subject to the terms of the Act there is no common liability between him and a third party, for the former responds by paying compensation, often without regard to fault, while the other is mulcted in damages based only on fault.<sup>16</sup>

In holding to this practical view, the instant case speaks of "proximate concurring cause" and "joint tortfeasors" as if the right invaded or the duty owed was common to both employer and third person. It does not deal with a possible right to indemnity which a third party may have against an employer where the employer's negligence is alleged to be the sole and proximate cause of the injuries or where it is alleged that a right to indemnity exists because of an independent duty owed by the employer to the third party. A typical case which might give rise to a claim for

<sup>11</sup> See a discussion of this view in a concurring opinion by Justice Learned Hand in *American Mutual Liability Ins. Co. v. Matthews*, 182 F. (2d) 322 (1950).

<sup>12</sup> 79 F. Supp. 448 (1948).

<sup>13</sup> 79 F. Supp. 448 at 449.

<sup>14</sup> — Md. —, 65 A. (2d) 304 (1949).

<sup>15</sup> — Md. — at —, 65 A. (2d) 304 at 308.

<sup>16</sup> *American Mutual Liability Ins. Co. v. Matthews*, 182 F. (2d) 322 (1950).

indemnity would be one where a longshoreman firm contracts with a shipowner to load a vessel or to do some maintenance work thereon. After the injured longshoreman, having elected to proceed against the third person, has recovered from the shipowner, the latter may look for indemnity from the injured employee's primary employer. In some instances, the contract between the firm and the shipowner may expressly provide for a right of indemnity. If so, it has been said to be axiomatic that the exclusive character of the worker's remedy against his primary employer would afford no protection to one who has seen fit to waive the protection.<sup>17</sup> In other cases, however, the contract may be silent on the point and a question would then be generated closely analogous to the one found in the instant case.

There is no clear cut decision which holds that no right of indemnity from an employer exists where the third party has been sued directly and the contract is silent, but there might seem to be every reason to expect an opposite holding. Such a right to indemnity might be said to arise from the breach of an independent duty owed by the employer to the third party as, for example, a duty to do the work contracted for in a proper manner. There is, therefore, strong authority that the breach of such an independent duty will afford the third party with a remedy, as by way of indemnification, against the employer notwithstanding the exclusiveness of the Act as it relates to claims by employees against employers.<sup>18</sup> A manifest difference does exist, however, between suits for contribution and suits for indemnity in that the latter rest on an expressed or implied agreement or obligation to respond for all the damages, whereas, under the former, a common burden is to be shared by persons who stand in *equali juri*.<sup>19</sup> That factor alone may serve as justification for the diversity in the holdings.

Looking to the remedy sought, however, the conclusion is inescapable that if a third party is entitled to seek indemnity from an employer because of some breach of duty resting in negligence, the employer is then being asked to respond in damages in an indirect way for something for

<sup>17</sup> *American Stevedores v. Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947), followed in *Porello v. United States*, 94 F. Supp. 952 (1950). See also *Lyons v. American-Hawaiian S. S. Co.*, 89 F. Supp. 334 (1950); *Severn v. United States*, 69 F. Supp. 21 (1946); *Benevento v. United States*, 68 F. Supp. 347 (1946), affirmed on other grounds in 160 F. (2d) 487 (1947); *Green v. War Shipping Administration*, 66 F. Supp. 393 (1946).

<sup>18</sup> *Rich v. United States*, 177 F. (2d) 688 (1949), citing with approval from *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N. Y. 175, 15 N. E. (2d) 567 (1938); *Burris v. American Chicle Co.*, 120 F. (2d) 218 (1941). New York cases are frequently cited by the federal courts on this problem in recognition of the fact that the federal statute is modelled on the New York Workmen's Compensation Law: *Coates v. Potomac Electric Power Co.*, 95 F. Supp. 779 (1951).

<sup>19</sup> *Barbara v. Stephen Ransom, Inc.*, 191 Misc. 957, 79 N. Y. S. (2d) 438 (1948).

which he could not be held to make direct response. If, by an impleading petition,<sup>20</sup> the third party is entitled to seek indemnity from the employer in the event he should be found liable to the injured employee, no practical reason would seem to exist for barring direct suit by employee against employer. As it is now clear that if the injury complained of is the sole fault of the employer the only available remedy to the employee is under the Act itself,<sup>21</sup> reasoning of this nature brings the ends of the arc of contribution and indemnity together at a point where direct opposition rather than harmony results. If resolution of that conflict is to be produced, it would seem as if the only way out would be the universal adoption of one view or the other. The instant holding, with its emphasis on the exclusive character of the employer's liability, may well become the starting point for a re-examination of the entire problem.

T. L. SPALDING

<sup>20</sup> Of necessity, the attempt would have to be made in a court where third-party practice prevails. As to whether such is possible in a state court sitting in Illinois, see 28 CHICAGO-KENT LAW REVIEW 33 and 29 CHICAGO-KENT LAW REVIEW 46-7.

<sup>21</sup> *Frusteri v. United States*, 76 F. Supp. 667 (1947); *Armento v. United States*, 74 F. Supp. 198 (1947); *Paolillo v. Redari A/B Disa*, 38 F. Supp. 833 (1941).

## RECENT ILLINOIS DECISIONS

APPEAL AND ERROR—DECISIONS REVIEWABLE—WHETHER ORDER DISMISSING SUIT, ENTERED AT REQUEST OF PLAINTIFF AFTER MOTION TO STRIKE HIS COMPLAINT HAS BEEN SUSTAINED, IS AN APPEALABLE ORDER AT INSTANCE OF THE PLAINTIFF—After a motion to quash service,<sup>1</sup> to strike a complaint,<sup>2</sup> or to deny a request for a new trial<sup>3</sup> has been granted, it does not follow that the disappointed litigant is thereupon free to appeal from the adverse ruling for the cause would still stand without the necessary “final judgment, order or decree” essential to support proceedings on appeal.<sup>4</sup> The successful party could, of course, follow up his motion with a further request to the court to dismiss the suit. If he does not, the holding in *McDavid v. Fiscar*<sup>5</sup> would indicate that the unsuccessful party, wishing to stand on his record without waiving any error that may have been committed, is entitled to apply for the entry of a final judgment without becoming involved in a possible claim that the judgment, because entered by consent, lacks the quality of an appealable order.<sup>6</sup> In that case, plaintiff’s complaint to recover, as administrator, for the wrongful death of his decedent had been stricken in the trial court on motion for failure to state a cause of action since it showed that the only heir at law was an adopted child of the decedent.<sup>7</sup> Neither the defendant nor the court took any further action<sup>8</sup> so the plaintiff, to protect a right to appeal, moved the court to enter judgment against him and judgment was so entered. The Appellate Court for the Third District, refusing to dismiss the appeal which followed upon that action, said it would be “too narrow and tech-

<sup>1</sup> *Brauer Machine & Supply Company v. Parkhill Truck Company*, 383 Ill. 569, 50 N. E. (2d) 836 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 207.

<sup>2</sup> *Gould v. Klabunde*, 326 Ill. App. 643, 63 N. E. (2d) 258 (1945).

<sup>3</sup> *Anderson v. Samuelson*, 340 Ill. App. 528, 92 N. E. (2d) 343 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 59-60.

<sup>4</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 201.

<sup>5</sup> 342 Ill. App. 673, 97 N. E. (2d) 587 (1951).

<sup>6</sup> *Nelson v. Nelson*, 340 Ill. App. 463, 92 N. E. (2d) 534 (1940), noted in 29 CHICAGO-KENT LAW REVIEW 58-9, illustrates the effect to be given, on motion to dismiss an appeal, to an “approved” decree entered by consent of parties.

<sup>7</sup> In that regard, the court found that the phrase “next of kin,” as used in Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 2, was not limited to blood relatives of the decedent but encompassed all those who would, by the laws of descent, fall within the class of “heirs at law” as defined by Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 162, hence permitted suit for the benefit of the adopted child. The result achieved was obtained by analogy from the holding in *Security Title & Trust Co. v. West Chicago St. R. R. Co.*, 91 Ill. App. 332 (1900), permitting recovery in a wrongful death case by the mother of an illegitimate child, and in *Cleveland, C. C. & St. L. Ry. Co. v. Baddeley*, 150 Ill. 328, 36 N. E. 965 (1894), allowing recovery for the benefit of a surviving husband, neither of whom would have been classed as “next of kin” according to the common law.

<sup>8</sup> The judge would have inherent power to dismiss for failure to prosecute.



nical a construction of the rules of law and procedure" to treat such a judgment as being one entered by consent. An undesirable over-liberality on the part of reviewing courts, straining to sustain the right to appeal, previously noticed,<sup>9</sup> may now become unnecessary if the unsuccessful party will remember to make a suitable motion to secure an unquestionable final order in the case.

APPEARANCE—WITHDRAWAL—WHETHER OR NOT A GENERAL APPEARANCE MAY BE WITHDRAWN, AFTER DELAY GRANTED AT DEFENDANT'S REQUEST, AND A SPECIAL APPEARANCE BE ENTERED—The defendant in *Athens v. Ernst*,<sup>1</sup> after entering a general appearance, obtained several extensions of time within which to plead to the complaint. Seven months later, the defendant filed a petition praying leave to withdraw the general appearance and praying that he be given leave to substitute a special appearance. He also sought leave to file a motion to quash the service and to dismiss the suit on the ground that the plaintiff had failed to exercise that degree of diligence in obtaining service required by Rule 5 of the Illinois Supreme Court.<sup>2</sup> It appeared that the plaintiff had sued to recover damages for personal injuries as well as property damage resulting from a boiler explosion in premises owned by the defendant and leased to the plaintiff. Summons was returned by the sheriff as "not found," as was also true of an alias summons. Some five years later, a *pluries* summons was issued and, according to the return, was personally served. Following service and general appearance, the attorney for the defendant obtained several extensions of time upon the ground that there was a question as to whether the defendant's insurance carrier would accept or decline responsibility. Thereafter, and upon proceedings taken as above indicated, the trial court granted defendant's several motions and dismissed the cause for want of prosecution. The Appellate Court for the First District, on appeal by plaintiff, reversed the decision on the ground that advantage had to be taken of formal defects and irregularities in process or service at the first opportunity, and before any other step had been taken in the cause, otherwise the same would be deemed cured.<sup>3</sup>

It is quite apparent that courts possess inherent power, in the interest of the efficient administration of justice, to dismiss suits for want of prosecution,<sup>4</sup> and it would appear that the plaintiff had been guilty of a

<sup>9</sup> See note in 22 CHICAGO-KENT LAW REVIEW 207, particularly p. 208.

<sup>1</sup> 342 Ill. App. 357, 96 N. E. (2d) 643 (1950).

<sup>2</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.5(2), provides that: "Where the plaintiff fails to show reasonable diligence to obtain service through the issuance of alias writs, the action may be dismissed on the application of any defendant or on the court's own motion."

<sup>3</sup> 42 Am. Jur., Process, p. 101, § 116.

<sup>4</sup> See *O'Dea v. Throm*, 332 Ill. 89, 163 N. E. 390 (1929).

want of diligence in the prosecution of the cause.<sup>5</sup> The law is also well settled that the entry of a general appearance is to be treated as a waiver of irregularities with respect to process and service, particularly where the defendant has obtained an extension of time or has taken some other step inconsistent with a special appearance.<sup>6</sup> The instant case, however, would seem to be one in which, for the first time, an Illinois court of review has been called upon to decide the precise question involved.<sup>7</sup> The court did not condone plaintiff's lack of diligence but did think that it would be unjust to permit the defendant to have the advantage of a general appearance and then, months later, be able to question the jurisdiction of the court. Keeping in mind the fact that it is the spirit of the Illinois Civil Practice Act that controversies should be speedily and finally determined according to the substantive, rather than the technical, rights of the parties,<sup>8</sup> the decision achieved in the instant case would seem to be sound.

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER STATUTORY AMENDMENT AUTHORIZING SUBSTITUTED SERVICE OF PROCESS ON RESIDENT MOTORIST WHO DEPARTS FROM STATE POSSESSES RETROACTIVE EFFECT—A serious defect existing in the Illinois statute relating to substituted service on motorists in connection with suits growing out of accidents arising from the use of the highways of the state<sup>1</sup> was corrected by an amendment thereto enacted in 1949.<sup>2</sup> As amended, the statute was made applicable not simply to non-resident motorists, as had previously been the case, but also to residents who, subsequent to the events giving rise to the cause of action, became non-residents.<sup>3</sup> The earlier case of *Glineberg v. Evans*<sup>4</sup> had indicated that service upon a resident

<sup>5</sup> The motion to dismiss recited that the defendant had, at all times between the commencement of the action and the service of the *pluries* summons, been openly and notoriously a resident of the county.

<sup>6</sup> See *People v. United Medical Service*, 362 Ill. 442, 200 N. E. 157, 103 A. L. R. 1229 (1936).

<sup>7</sup> The opinion cites only the case of *Raymondville Paper Co. v. St. Gabriel Lumber Co., Ltd.*, 140 F. 965 (1905), to the point. The defendant there had appeared generally and considerable time was spent in negotiations regarding a settlement. Four months later, the defendant raised the question of want of authority of its attorney to file a general appearance. The court held that the application for leave to file a special appearance came too late.

<sup>8</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 128.

<sup>1</sup> See comment on the case of *Carlson v. District Court*, 116 Colo. 330, 180 P. (2d) 525 (1947), appearing in 26 CHICAGO-KENT LAW REVIEW 159-62.

<sup>2</sup> Laws 1949, p. 1134, H. B. 235; Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 23.

<sup>3</sup> Technical objection to the application of the statute, prior to amendment, had also been voiced in *Rompza v. Lucas*, 337 Ill. App. 106, 85 N. E. (2d) 467 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 249.

<sup>4</sup> 341 Ill. App. 332, 93 N. E. (2d) 520 (1950), abst. opin.

motorist, by leaving a copy of the process with a member of his family, was permissible prior to the time such resident had effectively established a domicile elsewhere.<sup>5</sup> The recent case of *Sanders v. Paddock*,<sup>6</sup> however, discloses that the amendment in question may not be given retroactive effect. In that case, a defendant who had been a resident of the state at the time of a highway collision, but who had, prior to suit and attempted service, become an unquestioned resident of another state, was successful in his challenge directed against a purported service had on the Secretary of State as his supposed agent when it appeared that the accident had occurred prior to the passage of the 1949 amendment to the state statute, although service was not attempted until after that date. The Appellate Court for the Third District indicated that it would be "illogical to conclude that an Illinois motorist could conclusively appoint . . . an attorney by action of law, at a time when no such law was in existence."<sup>7</sup> Since the appointment of a statutory agent goes to the essence of the statutory scheme, and is not merely a procedural question,<sup>8</sup> the refusal to give retroactive application to the change in the statute would seem proper.<sup>9</sup>

DAMAGES—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGE—WHETHER OR NOT PAYMENT FOR A COVENANT NOT TO SUE, MADE BY ONE AGAINST WHOM TORT LIABILITY WOULD LIE, MAY BE USED TO MITIGATE DAMAGE IN SUIT AGAINST ANOTHER WHOSE TORT LIABILITY ARISES FROM THE SAME CIRCUMSTANCES—In the recent case of *New York, Chicago & St. Louis Railroad Company v. American Transit Lines, Inc.*,<sup>1</sup> plaintiff sought damages for the destruction of freight cars wrecked when a motor truck operated by the defendant collided with a railroad train. Among other issues, the trial court was asked to decide whether a deduction should be made, from the amount of the verdict for plaintiff, of a sum equal to

<sup>5</sup> The headnote in that case would indicate that the defendant had left Illinois, and was en route to California by automobile, two days before the process server arrived at what had been his "usual place of abode" within the meaning of Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 137.

<sup>6</sup> 342 Ill. App. 701, 97 N. E. (2d) 600 (1951).

<sup>7</sup> 342 Ill. App. 701 at 705, 97 N. E. (2d) 600 at 602.

<sup>8</sup> A change in the manner of conveying notice to the non-resident motorist was held to be no more than a procedural change in *Duggan v. Ogden*, 278 Mass. 432, 180 N. E. 301, 82 A. L. R. 765 (1932), hence could be given retroactive effect. See discussion in 28 CHICAGO-KENT LAW REVIEW 347-54 as to the effect to be given to a statute authorizing suit against the non-resident administrator of a deceased non-resident motorist's estate.

<sup>9</sup> See *Hartley v. Utah Construction Co.*, 106 F. (2d) 953 (1939); *Paraboschi v. Shaw*, 258 Mass. 531, 155 N. E. 445 (1927); *Ashley v. Brown*, 198 N. C. 369, 151 S. E. 725 (1930); *Schaeffer v. Alva West & Co.*, 53 Ohio App. 270, 4 N. E. (2d) 720 (1936); *Kurland v. Chernobil*, 260 N. Y. 254, 183 N. E. 380 (1932).

<sup>1</sup> 408 Ill. 338, 97 N. E. (2d) 264 (1951), in part reversing 339 Ill. App. 282, 89 N. E. (2d) 858 (1949). The cause for reversal pertained to matter not here important.

that received by the plaintiff for executing a covenant not to sue in favor of another joint tortfeasor who had been involved in the same harm. Because the trial court ruled favorably on defendant's motion to deduct such sum, plaintiff appealed to the Appellate Court for the Third District, which affirmed. The Supreme Court, on leave to appeal, also held that such payments could be used in mitigation of damages, although it reversed and remanded the cause for other reasons.

The decision of the Appellate Court for the Second District in *Aldridge v. Morris*<sup>2</sup> seems to have initiated a movement to permit such mitigation, although the question of the effect of such a covenant was not directly before the court for it found that the plaintiff there concerned actually had no right of recovery whatsoever. Without a right of recovery, of course, there could never be an assessment of damages against a defendant from which deduction could be made of money paid to a plaintiff for such a covenant. The issue was squarely raised in *Curtis v. City of Chicago*,<sup>3</sup> however, and the Appellate Court for the First District approved and applied the reasoning of the Aldridge case. The possibility of a conflict in decision in one of the other appellate districts has now been removed by the Supreme Court holding in the instant case, for that court not only examined the Aldridge case view on the subject but also noted its approval thereof by stating that the rule therein had been properly applied to the situation before it.

INFANTS—ACTIONS—WHETHER OR NOT MINOR, UNABLE TO RETURN BENEFITS RECEIVED, RATIFIES HIS DEED BY FAILURE TO TAKE AFFIRMATIVE ACTION TO REPUDIATE WITHIN SEVEN MONTHS AFTER ATTAINING MAJORITY—In the recent case of *Shepherd v. Shepherd*,<sup>1</sup> the plaintiff, when seventeen years of age, joined with an older brother in a conveyance of a life estate to their mother, without consideration, reserving a remainder in the property to themselves. Plaintiff joined the military service at eighteen, received his discharge in January, 1946, while still a minor, and returned to the farm with his wife and child, working for his mother as a salaried employee until June of that year. He attained his majority on May 2, 1946. Late in June, 1946, plaintiff moved to Chicago with the intention of attending a trade school. About this time, the older brother died testate leaving a will devising a life estate in his portion of the property to his wife with a remainder to plaintiff's minor son. In December, 1946, plaintiff began a suit to cancel the deed, naming his mother and his sister-in-law as

<sup>2</sup> 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), discussed in 27 CHICAGO-KENT LAW REVIEW 313.

<sup>3</sup> 339 Ill. App. 61, 89 N. E. (2d) 63 (1949).

<sup>1</sup> 408 Ill. 364, 97 N. E. (2d) 273 (1951).

defendants. The chancellor denied relief so the plaintiff appealed directly to the Supreme Court, a freehold being involved. That court affirmed the decree on the ground the plaintiff had ratified the deed given during minority by failure to repudiate promptly on becoming of age.<sup>2</sup>

It is unquestionably the law that a deed executed by a minor is not void but voidable only, so the transaction can become valid and effective if ratified by the grantor after he attains his majority.<sup>3</sup> It has also been held in Illinois that a minor, after becoming of age, has no more than a reasonable time in which to disaffirm, subject always to the requirement that he refrain from any distinct or decisive act in the meantime evidencing an intention to affirm his deed, for if he has, by conduct, ratified the deed he cannot, thereafter, avoid it.<sup>4</sup> The thing which makes the instant case noteworthy is (1) the shortness of the period of time intervening between the coming of age and the suit to disaffirm, and (2) the character of the acts regarded as being decisive. The court seems to have placed reliance on the fact that (1) plaintiff acquiesced in the grantee's control of the land and even worked for his mother after reaching his majority; (2) that he suggested that she rent the farm to a tenant; and (3) that plaintiff's older brother had made a will and had died before plaintiff had disaffirmed, thereby irrevocably fixing the nature of the interest of certain of the parties concerned. As the opinion does not fix the exact date when plaintiff suggested the renting of the farm, other than to say the suggestion was made in the spring of 1946, it is possible the remark may have been made before the plaintiff attained his majority. If so, such fact should have no force in the decision.<sup>5</sup> It is equally unsound to impute the conduct of the older brother, in making the will he did, to plaintiff as being a distinct and decisive act of the latter. True, estoppel could operate to prevent

<sup>2</sup> The nature of the holding is revealed more sharply by the following quotation from the opinion: "When Robert [plaintiff] attained his majority, his mother was in the exclusive possession and control of the farm and *Robert was in her employ*. This was the setting when Charles Shepherd, on June 21, 1946, made his will, devising his interest in the farm to his wife for life, with the remainder to Robert's young son. The evidence warrants the conclusion that *this disposition of Charles's interest in the farm was made in the belief that the family settlement would remain undisturbed* and that his mother had the right to stay on and operate the farm so long as she lived . . . *Robert recognized and acquiesced in her control and management of the land and ratified her action by working as her employee on the farm after May 2, 1946, his twenty-first birthday* . . . [Robert] did not disaffirm within a reasonable time, considering the facts and circumstances described, particularly when the evidence discloses that *he suggested to his mother she rent the property to a tenant*. . . ." 408 Ill. 364 at 378-9-81, 97 N. E. (2d) 273 at 280-1-2. Italics added to emphasize what might be considered to be the only evidence of an implied ratification on plaintiff's part.

<sup>3</sup> *Schlig v. Spear*, 345 Ill. 219, 177 N. E. 730 (1931).

<sup>4</sup> *Rubin v. Strandberg*, 288 Ill. 64, 122 N. E. 808 (1919).

<sup>5</sup> *Mandell v. Passaic National Bank and Trust Co.*, 18 N. J. Misc. 455, 14 A. (2d) 523 (1940).

disaffirmance,<sup>6</sup> but there is nothing in the opinion to indicate that the plaintiff induced the making of the will or even knew its terms prior to his brother's death. Nor did he accept any personal benefit under the will, for the testator devised his interest to plaintiff's minor child. There is, then, only one other fact left, to-wit: plaintiff worked for his mother for a period of less than two months after becoming of age. Can it be said that this was a distinct and decisive act enough to show an intention to ratify the deed? As he had been working for his mother for some four months while still a minor, it would be irrational, if not downright unfilial, to expect him to quit on the day he became of age, during a period of heavy farm work.

After the removal of these elements, the case boils down to one in which the minor failed to repudiate his deed until seven months after having attained his majority. The legislature has indicated its belief that a minor who has been harmed during his minority should have at least two years after becoming of age in which to maintain any suit,<sup>7</sup> such period being deemed a "reasonable" time within which to learn of, and to assert, his cause of action. Should not the court have been at least as liberal in making allowance for the immaturity of youth, particularly when those who should have given counsel were the ones most likely to withhold advice?

<sup>6</sup> *Lewis v. Van Cleve*, 302 Ill. 413, 134 N. E. 804 (1922).

<sup>7</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 22.

## BOOK REVIEWS

SOME PROBLEMS OF EQUITY. Zechariah Chafee, Jr. Ann Arbor, Michigan: University of Michigan Law School, 1950. Pp. xiv, 441.

Five lectures delivered by a distinguished legal scholar at the University of Michigan Law School in April, 1949, being the second of a series established under the will of the late William W. Cook for the purpose of stimulating legal research, form the basis of this book, although two of the chapters are reprints of articles written years ago and originally printed elsewhere.<sup>1</sup> It is characteristic of Professor Chafee, already renowned for knowledge and scholarship in many fields of law, that he should choose some seemingly unconnected problems of equity and, by combining them into one lecture series, should demonstrate the distinctiveness of equity as a system of its own while, at the same time, emphasizing the different approach which equity has toward the solution of various problems. The resulting product constitutes an effective answer to the now recognized ill-advised movement for the elimination of Equity as a separate course in the law school curriculum. The little band of those who still remain unconvinced should, by a reading of these lectures and the author's casebooks on the subject, be able to eliminate all doubts and join in the movement to restore Equity to the position it rightly deserves.

The book is divided into three parts, one dealing with the clean hands doctrine, another with representative suits, and the third with lack of power and mistaken use of power. Concerning the first, Professor Chafee sets out to pull the doctrine down to earth from the level of the lofty height of high-sounding phrases and clichés at which it has been placed by over-enthusiastic yet oftentimes superficial lawyers. Debunking the doctrine and questioning its status as a maxim, he asserts it is not peculiar to equity but more nearly consists of a bundle of rules relating to quite diverse subjects, the application of which have, at times, done more harm than good.<sup>2</sup> In support of the argument that the clean hands doctrine is not a single equitable principle, the author discloses that an examination of the applicable cases reveals the existence of not a single but actually eighteen different classes of situations responding thereto, which eighteen he discusses and analyzes separately. Particularly impressive, in this

<sup>1</sup> See Chafee, "Does Equity Follow the Law of Torts?" 75 U. of Pa. L. Rev. 1 (1926), and Chafee, "Bills of Peace with Multiple Parties," 45 Harv. L. Rev. 1297 (1932).

<sup>2</sup> Recent growth of the doctrine, often a bone of bitter contention, is illustrated by *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383, 64 S. Ct. 622, 88 L. Ed. 814 (1944), and other like cases.

reviewer's opinion, is the treatment accorded to the classes which deal with suits to enforce illegal contracts, suits to protect copyright and literary property rights, and cases involving matrimonial litigation.

A tremendous growth in the use of the procedural device of the representative suit is noted in the part of the book devoted to that topic. The enactment of Rule 23 of the Rules of Civil Procedure for the District Courts,<sup>3</sup> with its elaborate provision about class suits, and of the Fair Labor Standards, which authorizes the filing of suits for unpaid minimum wages or overtime compensation by one or more employees, or by a designated agent, "for and in behalf of all employees similarly situated,"<sup>4</sup> has undoubtedly contributed to that result. The author, while tracing the origin of the class suit to the earlier bill of peace with multiple parties, nevertheless stresses the distinction between these two procedural devices. Under a bill of peace, all interested parties unite as plaintiffs, although seeking individual relief, because the investigation of the respective claims would be, to a great extent, identical in the several cases. In the representative suit, however, the plaintiff becomes the self-elected representative of others who may have a common interest or a common grievance.

The ideal situation for a class suit will prevail, in the author's opinion, if "the members of the group are lost in the crowd and do not present individual claims or defenses which will require elaborate attention from the court."<sup>5</sup> The author emphasizes that the expression of the ideal situation does not mean that courts should never go outside the suggested limits; more nearly, that if they do, they should proceed with caution.

Particular attention is paid, by Professor Chafee, to the question of the binding effect of the class-suit decree upon the unnamed and unserved represented parties. His discussion of a problem which is particularly difficult in view of due process requirements is both searching and enlightening. His demand that some sort of notice to them should be provided is just and laudable. He rightly points out that one of the biggest and most neglected of problems entailed in class suits is the formulation of machinery by which such persons may become informed. Formal service being inappropriate, informal notice, for example an advertisement on the financial page of a large newspaper, might satisfy.

<sup>3</sup> 28 U. S. C. A., Rule 23.

<sup>4</sup> 29 U. S. C. A. § 216(b).

<sup>5</sup> Chafee, *Some Problems of Equity*, p. 220. The derivative suit by one, or a few, shareholders of stock in a corporation on behalf of all shareholders is typical. The object of such a suit is the redress of an injury inflicted on the corporation, as distinct from one which might have been directly inflicted on the shareholders. The right asserted is that of the corporation and any benefits obtained from the litigation inure to it. Aside from certain procedural requirements, one shareholder is interchangeable with any other and internal differences between shareholders are of no importance.



The third and final part of the book, one dealing with lack of power and mistaken use of power, might be entitled, as this reviewer would prefer it, "general jurisdiction as distinguished from 'equity' jurisdiction." While general jurisdiction deals with the question as to whether the sovereign has entrusted the decision of a particular case to a particular court, equity jurisdiction addresses itself to the problem as to whether or not there is a proper basis for coming into equity at all or whether equitable relief ought to be granted. Theoretically, the line of demarcation between the two would seem rather clear and simple; in practice, however, grave difficulties have arisen, sometimes due to an unfortunate confusion in terminology while, on other occasions, produced by the confused thinking on the part of a few judges. To deal with all aspects of the problem so analyzed would unduly lengthen this review. Suffice it to say that the author's discussion and criticisms are masterful.

F. HERZOG

HANDBOOK ON THE LAW OF MORTGAGES. George E. Osborne. St. Paul, Minnesota: West Publishing Company, 1951. Pp. xxi, 1117.

For many years, those who desired to use or possess a textual treatment of the law of mortgages of less elaborate character than such masterly treatises as those produced by Glenn, Jones or Wiltsie were forced to rely on the excellent but slender summary compiled by Walsh. There is now available, in customary Hornbook format, the more extensive, almost encyclopedic, analysis prepared by Professor Osborne. With a deprecating modesty reaching to almost unworthy lengths, the author has deplored the necessity for keeping the work to a reasonable compass. He should, by contrast, have demanded praise for making the book so comprehensive in so brief a space. No issue of law affecting the mortgage relationship, no judicial or statutory trend, however modern, has been overlooked. What lack there may be in failing to provide a digest of every recorded case in a field well known to be filled to overflowing is more than offset by suitable reference to leading and representative decisions and to collateral materials. More of interest, perhaps, is the fact that the work, while scholarly, is not just another dry treatise. Pungent comments and criticisms of existing doctrines as well as applause for well-turned views, scattered throughout the book, bring relief to pages that might otherwise force the mind to bog down under the sheer weight and intricacy of the material discussed. The author should rest assured that, except for change in the law itself, there will be no need for an "eventual second edition" in which to correct errors and failings in the present one.

INTRODUCTION TO BUSINESS ASSOCIATIONS. Elvin R. Latty. New York: Prentice-Hall, Inc., 1951. Pp. vii, 646.

An attempt has been made to compress many of the basic concepts of agency, corporation, and partnership law into the compass of a slim volume in order that a course in business associations, for which this book is evidently intended as a primer, might be treated as a springboard to the more abstruse concepts inherent in any one of these three fields of study. It is to be doubted, however, that the author has fully realized his goal. Unquestionably, in preference to a total absence of training in any one or more of these branches of law, a course predicated on a book such as this would be beneficial. Experience would indicate, nevertheless, that legal concepts are best comprehended when examined and developed separately. Confusion in the mind of the average student seems to be the order of the day whenever varying, although analogous, concepts are discussed together. To be sure, no field of law is independent of any other, but to begin study in the more complex areas of any branch of law on the assumption that basic concepts have been absorbed and understood is a mistake.

Aside from criticism of the basic theory underlying the instant volume, there is the further fact that much too much of the book is devoted to textual material rather than to cases. For example, of the twenty-six pages comprising the first chapter, only five are devoted to the four cases considered. A corresponding ratio may be observed in the other chapters. A happier medium could have been attained. A diligent student, unable because of scheduling difficulties to enroll in agency or partnership courses, would likely find this book invaluable just prior to bar examination time. It might also serve as a refresher course. It is, however, ill adapted for use in a full course devoted to either agency, corporation, or partnership law.

ESTATE AND GIFT TAXATION: Cases and Materials. Boris I. Bittker. New York: Prentice-Hall, Inc., 1951. Pp. xviii, 494, and supplement.

In response to the demand that the law school curriculum be enriched by the addition of newer topics in fields of recent development, considerable effort has been put forth in recent years to integrate older and related materials into more compact courses to permit the release of time for study in these newer fields. Separate courses in liens, pledges, mortgages and suretyship, for example, have been telescoped into a unit of Security Transactions. Agency, partnership and private corporations have been combined into a category of Business Organizations. Other illustrations could come readily to mind. With the publication of Professor Bittker's book, however, there may be some indication that the

pendulum has swung too far in the direction of consolidation and is now due to reverse itself in favor of a fragmented approach to the study of law. Acting on the premise that courses in taxation have been weighted heavily along the lines of income and similar taxes, with estate and gift taxation receiving only a few pages or chapters in casebook collections, he has broken off this small segment from the general field for more intensive treatment.

It is doubtful if a law school dean will welcome the thought that a crowded curriculum should be made even more crowded by the addition of yet another course on a single aspect of taxation, but he will no longer be able to utilize the excuse that suitable material is lacking for the present book, with its eighty-page supplement of specimen returns completely worked out for filing, nullifies any such alibi. He may now seek refuge in the claim that it would be ridiculous to spend perhaps from a third to a half of the time generally devoted to teaching taxation in an area which, as the author acknowledges, produces only from two to five per cent. of the governmental revenues. The question, however, is not one to be resolved in terms of percentages, for skill in long-range planning is something each law student should develop. If both the dean and the student would trouble themselves to read the author's introduction, each might awaken to the fact that there is occasion to welcome a work of this sort if for no more than as a valuable adjunct to other tax casebooks. The lawyer, too, could learn that a collection of cases and materials on a specialized subject such as this one may often fill a substantial gap in his working library.

DESTINATION UNKNOWN: FIFTY YEARS OF LABOR RELATIONS. Walter Gordon Merritt. New York: Prentice-Hall, Inc., 1951. Pp. x, 454.

The compilation of an unbiased and objective history of labor relations in the United States over the past fifty years would be a worthwhile task for it could contribute much to an understanding of present-day labor conditions. It would serve its purpose, however, only if it were prepared by one possessed of unbiased judgment. It is unfortunate, therefore, that the author of this book, a lawyer who has battled organized labor throughout his career, should disclose a lack as to these needed qualities; for his book is nothing short of a constant and total accusation of unions and union leaders as being the epitome of everything evil. Perhaps this jaundiced attitude can be traced to the author's early experiences, for he describes how he, the son of a union-battling hat manufacturer, grew up in Connecticut, and how his first activity, as a lawyer fresh from law school, was to fight the Hatters' Union in the celebrated Danbury Hatters' case. His

early characterization of the agents of that union as being "bloodhounds" may be symptomatic of his later attitude, albeit later pronouncements are not quite so vigorous, being mollified by an apparent sense of diplomacy.

The author's method for the compilation of his historical treatment of the subject is to take some well-known labor cases, chiefly those in which he has actively participated, to describe them, and then to append his own opinion concerning them. As these descriptions reflect a purely one-sided approach, being written by a man who has been passionately engaged on but one side of the industrial battle, it is not astonishing that the author should arrive at a completely distorted as well as a gloomy picture of American labor relations. Not that plenty of criticism cannot be levelled against unions in general, or against certain labor leaders in particular, for there is much to criticize. Valid criticism, however, would fall a long way short of the intimation that almost everything about unionism is bad. So negative an attitude most certainly would contribute nothing to industrial peace, particularly since it would neglect completely, as does the author, to take into consideration those causes which have provoked the development and growth of unionism in this country. Yet, without such consideration, it is difficult to fathom how fifty years of labor relations can be accurately appraised. From such scant preparation, a trip into the future must, of necessity, lead to a "destination unknown." As a consequence, many of the suggestions made by the author must be viewed with caution, although some of them would seem reasonable and just. One chapter, entitled "The Onward March of Collective Bargaining," should be excepted from the scope of this criticism for the author there basis his observations and conclusions upon his great experience in the field and on an obvious attempt to be impartial. It is probably the best part of the book.

For an antidote, this reviewer would suggest a re-reading of the objective description of labor relations in this country, with its sound criticism of the bad things in unionism, to be found in Professor Gregory's "Labor and the Law."<sup>1</sup> Of like character is the article entitled "Labor, Legislation, and the Role of Government," written by Professors Feinsinger and Witte.<sup>2</sup> The positive approach to the problem and the optimism to be there encountered should prove refreshing after the sordid picture painted in the book under review.

F. HERZOG

<sup>1</sup> Charles O. Gregory, *Labor and the Law* (New York, W. W. Norton & Co., Inc., 1949), Rev. Ed.

<sup>2</sup> Feinsinger and Witte, "Labor, Legislation, and the Role of Government," 71 *Monthly Labor Rev.* 48 (1950).

CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS, Third Edition. Lillian Doris and Edith J. Friedman. New York: Prentice-Hall, Inc., 1951. Pp. lxxiii, 1114.

Ten years of experience under laws of the type of the Securities Exchange Act, the Public Utility Holding Company Act, the Trust Indenture Act, and the revision of the Bankruptcy Act should offer proof enough of the necessity for revising form books intended to aid corporate officials and their lawyers. Awareness of this fact has led the authors of this corporate secretary's *vade mecum* to revise, up-date and release the third edition. A rapid glance at the cases cited in support of the textual material which precedes the specimen forms makes evident the inclusion of scores of new cases decided within the last decade.<sup>1</sup> The forms themselves have likewise been subjected to much revision.

Perhaps more important than the timeliness of the book is the thoroughness with which the job has been done. Details have been worked out to the length where, for example, check lists have been provided concerning things to watch for or persons to notify in case a change occurs in so simple a matter as the corporate name. The corporate secretary is even warned, in relation to his duties, to have the correct amount of cash on hand, in proper denominations, to pay the directors for their services if prompt payment at the close of each meeting has been the practice in the past! The evident desire for efficient operation, as indicated by such advice, has been carried over to make this third edition of a popular work into a most usable publication. It provides the answers not only for the obvious but also for those abstruse<sup>2</sup> questions which may arise in the matter of preparing corporate minutes or supervising the conduct of corporate meetings.

<sup>1</sup> It is not claimed that the list is complete. In the discussion of the right of a corporation to amend the articles, so as to deprive preferred shareholders of accrued but undeclared cumulative dividends, no mention is made of the holding in *The Western Foundry Co. v. Wicker*, 403 Ill. 260, 85 N. E. (2d) 722 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 159, which produced a marked change in the Illinois law on the point. The presence of other recent Illinois cases is, however, noted.

<sup>2</sup> What, for example, should the chairman do if persons not entitled to vote have been admitted to a stockholders' meeting and their continued presence might lead to potential objections or antagonisms? An ingenious and diplomatic answer is provided by the authors at page 15. Or try this one: Between a regular meeting and an adjourned session thereof, a registered shareholder has transferred his shares but still desires to vote the same on the theory he was a holder at the time the meeting commenced. Is he entitled to do so? A documented answer is given at page 22. These two samples should serve to indicate the completeness of the work in question.

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